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IN THE

Supreme Court of the United States

October Term, 1973

No. ~~73~~ - 555

JOHN V. LINDSAY, as Mayor of the City of New York, THE CITY OF NEW YORK, CITY CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, HARRY I. BRONSTEIN, as Personnel Director of the City of New York and as Chairman of such Commission, MILTON SAMORODIN, JAMES W. SMITH, Members of such Commission, PATRICK V. MURPHY, as Police Commissioner of the City of New York, ROBERT O. LOWERY, as Fire Commissioner of the City of New York,

Petitioners,

against

MICHAEL J. MAYE, Individually, and as President of Uniformed Firefighters Association, Local 94, International Association of Firefighters, AFL-CIO, UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, EDWARD J. KIERNAN, Individually and as President of Patrolmen's Benevolent Association of the City of New York, Inc., PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., HAROLD H. MELNICK, Individually and as President of Sergeant's Benevolent Association of the New York City Police Department, SERGEANT'S BENEVOLENT ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, JAMES T. KELLY, Individually and as President of Detectives Endowment Association, Police Department, City of New York, Inc., DETECTIVES ENDOWMENT ASSOCIATION, POLICE DEPARTMENT, CITY OF NEW YORK, INC., VINCENT A. COOKE, Individually and as President of Lieutenant's Benevolent Association, LIEUTENANT'S BENEVOLENT ASSOCIATION, RAYMOND W. GIMMLER, Individually and as President of Uniformed Fire Officers Association, Local 854, International Association of Firefighters, AFL-CIO, UNIFORMED FIRE OFFICER'S ASSOCIATION, LOCAL 854, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, JOSEPH L. BALZANO, Individually and as President of New York City Housing Patrolmen's Benevolent Association, Inc., NEW YORK CITY HOUSING PATROLMEN'S BENEVOLENT ASSOCIATION, INC., TIMOTHY O'SULLIVAN, ROBERT CUNNINGHAM, and THOMAS ALBERT DOUGHERTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitution and Statutory Provisions Involved	3
Statement of the Case	3
The Notice of Examination	5
Reasons Relied on for the Allowance of the Writ	10
Conclusion	18
Decision and Order of Court of Appeals	19
Opinion of Appellate Division	20
Opinion of Special Term	25
Federal Constitutional and Statutory Provisions Involved:	
Constitution, Article 6, Clause 2, Supreme Law of Land	40
Chapter 41 of Title 42, U. S. Code	40
State Constitutional and Statutory Provisions Involved:	
Constitution of the State of New York:	
Article 5, §6. Civil Service appointments and promotions	43

PAGE

New York Civil Service Law:

§23. • • • certification of • • • municipal eligible lists 43

New York Public Officers Law:

§3. Qualifications for holding office 44

§30. Creation of vacancies 47

Cases Cited

Brotherhood R. R. Trainmen v. Jacksonville Term. Co., 394 U. S. 369 (1969) 11, 14

California v. Zook, 336 U. S. 725 (1949) 11, 13

Campbell v. Hussey, 368 U. S. 297 (1961) 11fn

Carleson v. Remillard, 406 U. S. 598 (1972) 11, 15, 16

Catholic Med. Cen. of Brooklyn & Queens Inc. v. Rockefeller, 305 F. Supp. 1268 (E. D. N. Y., 1969), vac. o. g. 397 U. S. 820 (1970) 11fn

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U. S. 132 (1963) 12

Hill v. Florida ex rel. Watson, 325 U. S. 538 (1945) 11

Hines v. Davidowitz, 312 U. S. 52 (1941) 11, 12

Hood & Sons v. Du Mond, 336 U. S. 525 (1949) 11fn

James v. Valtierra, 402 U. S. 137 (1971) 15

King v. Smith, 392 U. S. 309 (1968) 11, 14, 15

Malchszak v. Schmidt, —— F. Supp. —— (D. C. E. D. Wisc., 5/7/73, 41 L. W. 2665) 15

PAGE

Nash v. Florida Industrial Comm., 389 U. S. 235 (1967) 11, 14

Perez v. Campbell, 402 U. S. 637 (1971) 11, 12, 14

Rodriguez v. Barcelo, —— F. Supp., ——, (D. C. P. R., 5/15/73, 41 L. W. 2661) 15

Sperry v. Florida ex rel. Florida Bar, 373 U. S. 379 (1963) 11

Swann v. Charlotte-Mecklenburg Board of Education, 312 F. Supp. 503 (D. C. W. D. N. Car. 1971) affd., 402 U. S. 43, app. dism 402 U. S. 47 (1971) 11

Townsend v. Swank, 404 U. S. 282 (1971) 11, 15

Statutes Cited

Constitution of the United States:

Article 6, Clause 2 .....3,14, 40

42 U. S. C. §3301-3313 .....3, 4, 5, 10, 13, 40

Constitution of the State of New York:

Article 5, Section 6 ..... 3, 43

New York State Civil Service Law:

Section 23 ..... 3, 43

New York State Public Officers Law:

Section 3 ..... 3, 44

Section 30 .....3, 47

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No. .....

JOHN V. LINDSAY, as Mayor of the City of New York, THE CITY OF NEW YORK, CITY CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, HARRY I. BRONSTEIN, as Personnel Director of the City of New York and as Chairman of such Commission, MILTON SAMORODIN, JAMES W. SMITH, Members of such Commission, PATRICK V. MURPHY, as Police Commissioner of the City of New York, ROBERT O. LOWERY, as Fire Commissioner of the City of New York,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners respectfully pray that a writ of certiorari issue to review the final decision and order of the Court of Appeals of the State of New York, rendered on July 2, 1973, that reversed the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on March 8, 1973, and reinstated the final judgment of the Supreme Court of the

State of New York, County of New York, entered on April 18, 1972.

Opinions Below

The decision of the New York State Court of Appeals was unaccompanied by any written opinion, but instead referred to the opinions at the New York County Special Term and in the Appellate Division, respectively. The memorandum of decision by the Court of Appeals is appended hereto, *infra,* at page 19 (33 NY 2d 552). The opinion of the New York County Special Term, referred to in that memorandum of decision, is appended hereto, *infra,* at page 25 (69 Misc 2d 276). The opinion of the Appellate Division, likewise referred to in that memorandum of decision, is appended hereto, *infra,* at page 20 (41 AD 2d 127).

Jurisdiction

The decision of the Court of Appeals was rendered on July 2, 1973, and, as stated, is appended hereto, *infra,* at page 19. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

Question Presented

Is the Supremacy Clause of the Federal Constitution, Article 6, Clause 2, violated where, despite the Congressionally-adopted Model Cities program for improving the quality of urban life (declared by Congress to be the most critical domestic problem facing the country), and the definitely prescribed federal requirement under that program that disadvantaged Model Cities residents to be beneficiaries under that program must be, and continue to be resident in such Model Cities areas, the State court strikes down a New York City Civil Service examination for the newly-created positions of "Police Aide (Model

Cities)", "Fire Aide (Model Cities)" and "Housing Police Aide (Model Cities)", striking down also the requirement contained in the notice for such examination that applicants must be residents of a Model Cities area at the time of the application and continue to be residents in a Model Cities area during the period of employment?

Constitutional and Statutory Provisions Involved

The constitutional provision involved is Article 6, Clause 2, of the Constitution of the United States.

The federal statutory provisions involved are: 42 U.S.C. §§3301-3313.

The State constitutional and statutory provisions involved are: Article 5, Section 6, of the Constitution of the State of New York; New York State Civil Service Law, Section 23; and New York State Public Officers Law, Sections 3 and 30.

All these constitutional and statutory provisions, to the extent applicable to this case, are set forth *infra* at pages 40 *et seq.*

Statement of the Case

In 1966, Congress enacted Chapter 41 of Title 42 of the U. S. Code, entitled "Demonstration Cities and Metropolitan Development Program". Subchapter I (42 U.S.C. §§ 3301-3313), headed "Comprehensive City Demonstration Programs", and the Federal regulations promulgated thereunder, implemented what is know as the "Model Cities Program".

Section 3301 stated the Congressional findings and declaration of purpose:

> §3301. *Congressional findings and declaration of purpose*
>
> The Congress hereby finds and declares that improving the quality of urban life is the most criticial domestic problem facing the United States. * * *

The Congress further finds and declares that cities, of all sizes, do not have adequate resources to deal effectively with the critical problems facing them, and that Federal assistance * * * is essential to enable cities to plan, develop, and conduct programs to improve their physical environment * * * and provide educational and social services vital to health and welfare.

The purposes of this subchapter are to provide additional * * * assistance to enable cities of all sizes * * * to plan, develop, and carry out locally prepared and scheduled comprehensive city demonstration programs containing new and imaginative proposals to rebuild or revitalize large slum and blighted areas; to expand * * * job, and income opportunities; to reduce dependence on welfare payments; to improve educational * * * programs; * * * to reduce the incidence of crime and delinquency; * * * to establish better access between homes and jobs; * * * and to accomplish these objectives through the most effective * * * efforts to improve the quality of urban life."

Section 3302 authorized the Secretary of Housing and Urban Development to make direct grants to cities and otherwise provide assistance to enable city agencies to plan, develop and carry out comprehensive city demonstration programs in accordance with purposes of the federal statute.

Section 3303 provided in subdivision (a) (2), (4) and (5), and subdivision (b) (1), as follows:

"§3303. * * *

(a) A comprehensive city demonstration program is eligible for assistance * * * only if——

* * *

> (2) the program is of sufficient magnitude * * * to make marked progress in reducing social and educational disadvantages, * * * underemployment, and enforced idleness; and to provide * * * maximum opportunities for employing residents of the area in all phases of the program, and enlarged opportunities for work and training;
>
> * * *
>
> (4) * * *substantive local laws, regulations, and other requirements are, or can be expected to be, consistent with the objectives of the program; * * *
>
> (5) the program meets such additional requirements as the Secretary may establish to carry out the purposes of this subchapter * * *."

As part of New York City's proposed program to benefit under this Federal program, the City designated three areas as Model Cities areas—Central Brooklyn, Harlem—East Harlem and South Bronx.

As part of the program, the City Civil Service Commission created certain new civil service titles designated as "(Model Cities)" or "(M.C.)". Specifically, it created the titles "Police Aide (Model Cities)", "Patrolman (Model Cities)", "Police Trainee (Model Cities)", and corresponding titles with regard to Firemen and New York City Housing Authority Policemen.

The Notice of Examination

The notice of the examination here involved, which was dated September 16, 1971, announced an examination for the newly-created positions of "Police Aide (Model Cities)", "Fire Aide (Model Cities)", and "Housing Police Aide (Model Cities)". It stated that the salary was $5,750 per annum and that approximately 800 "Aide"

positions would be filled. It specified as an age requirement the ages of 16 to 27 on the date of the written test. It stated that there were no formal education or experience requirements.

It contained the further requirement, applicable only during the period of employment in a Model Cities title, that:

> "Residence Requirements: Applicants must be residents of a Model Cities area at the time of filing and must continue to reside in the same Model Cities area during the period of employment in a Model Cities title."

It stated that, after six months, the Aides would be eligible to participate in promotion examinations so that, for example, a "Police Aide (Model Cities)" could, upon such promotion, be appointed to "Police Trainee (Model Cities)" if under 21, or to "Patrolman (Model Cities)" if 21 and over. Analogous promotions could be made in the fireman and housing authority patrolman categories. It stated:

> "A single list based on residence will be established as a result of this examination for each Model Cities area and appointments will be made to Police Aide (Model Cities), Fire Aide (Model Cities) and Housing Police Aide (Model Cities)."

It specified that appointments to the "Aide" titles would be for a period not to exceed 15 months and that the services of Aides not promoted within the 15-month period would be terminated. It stated that the "Aide" positions were in a "Model Cities Uniformed Aide Training Program".

It stated as to the new title of "Police Aide (Model Cities)":

> "*Duties and responsibilities.* Under close supervision of the Police Department, working in a Model Cities area, assists and works mainly in programs designed to develop closer understanding and cooperation between the community and the Police Department; assists departmental personnel assigned to Model Cities areas in the attainment of Department objectives. Undergoes a prescribed period of on-the-job training and formal instruction directed toward becoming a Patrolman (Model Cities). (Police Aides will not carry weapons or firearm in the performance of their duties.)"
>
> • • •
>
> "*Examples of Typical Tasks* Assists in guiding and servicing members of the local community and community organizations in preventing juvenile delinquency. Assists in identifying and resolving problems tending to produce community tension. Assists in organizing and conducting community relations and education programs with special emphasis on community problems. Assists in receiving and referring crime complaints. Assists in patrolling and observing parks and playgrounds and other locations where youth gather. Surveys the community for dangerous, crime provoking, and unsanitary conditions. Provides aid to the sick and injured through ambulance service. Assists the handicapped whenever required. Performs related non-enforcement duties as required by the Police Commissioner."

(It contained comparable specifications as to duties and responsibilities and enumeration of typical tasks with reference to the other "Aide" positions.)

It stated that from the titles of "Patrolman (Model Cities)", "Fireman (Model Cities)" and "Patrolman N. Y. City Authority Police Department (Model Cities)" there would be further opportunities for promotion at a future time to regular titles in the Police, Fire and Housing Authority police services.

Petitioners brought this proceeding against various named New York City officials, seeking declaratory judgment and both final and preliminary injunction. Petitioners alleged that the positions of New York City Patrolman, Fireman and Housing Patrolman (not, be it noted, "Model Cities") had at all times referred to in the petition been included in the competitive class under the Civil Service Laws of the State. Petitioners described the City's Model Cities program and steps thus far taken by the City thereunder, including the announced examination. They alleged that 825 vacancies existed in the "Aide (M.C.)" positions, and accordingly that a list of no less than 825 eligible for appointment to such "Aide (M.C.)" positions would be established.

Petitioners, alleging the claimed illegality under state statutes of the scheduled examination and residence requirement, sought a declaration of the unconstitutionality and illegality of the actions complained of and asked for an injunction against their further implementation.

The answer to the petition recited that, as provided in 42 U.S.C. §3303, the City's Model Cities administration had submitted to the Secretary a comprehensive plan intended to effectuate the purposes of the federal statute. It then alleged the following:

> "11. In order to provide more and better municipal services and more job opportunities for Model Neighborhood residents in Model Cities programs,

the Model Cities Administration instituted training programs to encourage entry into the Uniformed Forces of the Classified Civil Service. * * *

12. Thereafter, in respect to job training for Civil Service positions, HUD determined that, nationwide, such programs were not doing an adequate job of bringing Model Neighborhood residents into permanent civil service positions.

13. Pursuant to statutory authority, HUD issued guidelines which provide, *inter alia,* CDA Letter No. 11, Nov. 1970, Secs. 2 (b) and (d):

> 'The CDA and each public or private agency operating a CCDP component will establish minimum quantitative objectives for resident employment and will indicate how these objectives are to be met through recruitment, selection, preemployment and on-the-job training, upgrading and other procedures. The training and employment procedures will be designed to remove indentified impediments to hiring and upgrading of disadvantaged Model Neighborhood residents and provide them with occupational mobility through seniority, interagency transfer agreements, civil service status, union membership or other prerequisites to such mobility. Each city will show how it plans to remove or ease significant merit system impediments to the employment of disadvantaged Model Neighborhood residents in CC PD related jobs.* * * '

14. The Model Cities Administration thereupon submitted the program under attack herein, which complied with the new HUD requirements as amplified by HUD officials."

The above-quoted allegations, specifically those contained in paragraphs 12, 13 and 14, are to be read against the provision of Section 3303(a)(5) of the federal statute quoted *ante* at page 5, which authorized the Secretary of HUD to establish additional requirements to be met by the municipalities "to carry out the purposes" of the federal program.

Reasons Relied on for the Allowance of the Writ

1. This case presents squarely the question whether a state may frustrate a federal program by enforcing provisions in state statutes which have the effect of frustrating municipal actions taken to enable persons in that municipality to proceed in accordance with, and benefit from, that program and the policies behind that federal program.

2. The decision of the New York Court of Appeals goes counter to the holding in numerous recent decisions of this Court (and of other Courts in reliance on such recent decisions) that under the Supremacy Clause, Article 6, Clause 2, a state may not frustrate a federal program, in this instance, the federal Model Cities program, by barring persons in the State from proceeding in accordance with that federal program and the policies behind it.

3. Special Term had overruled the City's contention that application of state statutes relied upon by petitioners would violate Article 6, Clause 2, of the federal Constitution. Special Term's basis for so deciding was its position that Congress "explicity stated that it did not intend to override state statutes". The Court of Appeals, in reversing, adopted the opinion of Special Term as its own.

It is submitted that the Court of Appeals, like Special Term, misconceived the scope of the Supremacy Clause as applied to a situation such as here presented.

The controlling rule of constitutional law, it is submitted, is not as the Court of Appeals or Special Term held, *i.e.*, that the determinative question "whether Congress intend(ed) to override state statutes".

In the complex interplay of federal and state and, incidentally, municipal laws, one cannot seek to ascertain a simple expression of Congressional intent with regard to the statutes of the fifty states. Instead the central, and indeed determining, meaning of the Supremacy Clause is that when a federal program is adopted in pursuance of the exercise of a valid federal power, a state lacks power to condition the operation of the federal program and policies in such a manner as to retard, impede or otherwise stand as an obstacle to the accomplishment and execution of the full purposes and objectives of that federal program. *Perez* v. *Campbell*, 402 U. S. 637 (1971); *Brotherhood R. R. Trainmen* v. *Jacksonville Term. Co.*, 394 U. S. 369, 380-381 (1969); *King* v. *Smith*, 392 U. S. 309, 333-334 (1968); *Nash* v. *Florida Industrial Comm.*, 389 U. S. 235, 239-240 (1967); *Sperry* v. *Florida ex rel. Florida Bar*, 373 U. S. 379 (1963); *California* v. *Zook*, 336 U. S. 725, 729 (1949); *Hill* v. *Florida ex rel. Watson*, 325 U. S. 538 (1945); *Hines* v. *Davidowitz*, 312 U. S. 52 (1941). See, also, *Townsend* v. *Swank*, 404 U. S. 282 (1971); *Carleson* v. *Remillard*, 406 U. S. 598, 604 (1972); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 312 F. Supp. 503 (D. C. W. D. N. Car., 1971), affd., 402 U. S. 43, app. dism 402 U. S. 47 (1971).*

That governing principle was authoritatively summarized in *Perez* v. *Campbell*, *supra*, 402 U. S. 637, as follows (WHITE, J., p. 649):

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* The phrase in the Supremacy Clause, "Laws of the United States" encompasses, in addition to statutes, valid Federal regulations. *Campbell* v. *Hussey*, 368 U. S. 297, 302 (1961); *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 541, 544 (1949); *Catholic Med. Cen. of Brooklyn & Queens Inc.* v. *Rockefeller*, 305 F. Supp. 1268 (E. D. N. Y., 1969), vac. o. g. 397 U. S. 820 (1970).

"• • • Three decades ago Mr. JUSTICE BLACK, after reviewing the precedents, wrote in a similar vein that, while '[t]his Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, ha[d] made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference[,] . . . [i]n the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). Since *Hines* the Court has frequently adhered to this articulation of the meaning of the Supremacy Clause. See, *e.g.*, *Nash* v. *Florida Industrial Comm'n*, 389 U. S. 235, 240 (1967); *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 229 (1964); *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U. S. 714, 722 (1963) (dictum); *Free* v. *Bland*, 369 U. S. 663, 666 (1962); *Hill* v. *Florida*, 325 U. S. 538, 542-543 (1945); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942)."

The *Hines* test, as above enunciated, is far from the simplistic doctrine followed here by Special Term and the Court of Appeals, namely, the limited question merely "whether Congress intend[ed] to override state statutes."

The unanimity of view as to the *Hines* test is such that in the *Perez* case, the Court alluded to the fact that in "a recent case in which the Court was closely divided", namely, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132 (1963), "all nine Justices accepted the *Hines* test", referring to 373 U. S. at page 141 for the opinion

of the Court and page 165 for the dissenting opinion (402 U. S. at pp. 649-650). In *California* v. *Zook*, 336 U. S. 725 (1949), the same controlling principle was succinctly stated in this language (MURPHY, J., p. 729):

> "But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same; does the state action conflict with national policy?"

4. As seen, Special Term and the Court of Appeals based their rulings with regard to the Supremacy Clause on the sole, assumed basis that Congress "did not intend to override state statutes". For this, Special Term had cited as the only pertinent statute Section 3303(a), which provides:

> "Section 3303(a). A comprehensive city demonstration program is eligible for assistance under §§105 and 107 only if:
>
> * * * (4) * * * substantive local law, regulations are, or can be expected to be consistent with the objectives of the program * * *."

It is submitted, however, that the quoted language of the federal statute cannot be interpreted to mean, as Special Term and the Court of Appeals have held it to mean, that Congress intended to permit states to condition the federally-adopted Model Cities program in such manner as to transform that program from what Congress envisaged and prescribed to something wholly different. But this is the implication, and indeed the consequence, of the Court of Appeals' and Special Term's ruling that the requirements of state law did, and properly could, negate the explicit requirements the federal government had prescribed by regulation adopted pursuant to statutory

authority. The cases of *King* v. *Smith*, 392 U. S. 309 (1968); *Nash* v. *Florida Industrial Comm.*, 389 U. S. 235 (1967), and *Brotherhood of Railway Trainmen* v. *Jacksonville Term. Co.*, 394 U. S. 369 (1969), all *supra*, hold that states cannot constitutionally so negate federal policy.

Such a result, so contrary to established constitutional law and holdings under the Supremacy Clause, would require language of Congressional permission far more explicit and persuasive than the purely exhortatory statements in Section 3303(a)(4) quoted *ante*, page 5, on which the Court of Appeals and Special Term relied.

In enacting Chapter 41 of Title 42 of the United States Code, entitled, "Demonstration Cities and Metropolitan Development Program", with Subchapter I headed, "Comprehensive City Demonstration Programs", Congress had its attention on the plight of cities as the principal, if not the sole, target of its action. It is not challenged by petitioners that Congress, in enacting the statue in question, was acting within its delegated and authorized powers. There is nothing in the federal statute to indicate that Congress intended to allow states to frustrate the exercise of its proper powers, as by imposing restrictions on city action contrary to, and indeed cancelling out, the program of the federal government adopted with reference to the cities of the nation. A state cannot, even by accident, let alone design, impose conditions applicable to the operation of the federal program within the federal government's authorized sphere in such a manner as to frustrate that program. *Perez* v. *Campbell*, *King* v. *Smith*, *Nash* v. *Florida Industrial Commission*, all *supra*. The Supremacy Clause, Article 6, Clause 2, is explicit in its provision that "the Judges in every State shall be bound thereby [*i.e.*, by a federal statute properly enacted and regulations promulgated thereunder], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

5. It is in no way determinative that the federal aid offered is optional and not mandatory on the state. The authorities make clear that, while a state may (where the federal statute so permits) reject the proffered federal aid *in toto*, it may not, even where acceptance of the proffered aid is optional with the State, condition acceptance of that aid in such a manner as to contravene, frustrate and in final effect negate, the federal policy and program. *King* v. *Smith*, *Townsend* v. *Swank*, *Carleson* v. *Remillard*, all *supra*. See also: *Rodriguez* v. *Barcelo*, —— F. Supp. ——, (D. C. P. R., 5/15/73, 41 L. W. 2661), specifically in involving Federal Model Cities Program and an attempt to deprive Model Cities area residents of rights thereunder; *Malchszak* v. *Schmidt*, —— F. Supp. —— (D. C. E. D. Wisc., 5/7/73, 41 L. W. 2665), also involving attempted thwarting of AFDC benefits.

James v. *Valtierra*, 402 U. S. 137 (1971), which might be claimed to hold to the contrary of the cases last cited, is readily distinguishable. We cite the language of that case (402 U. S. 140): "By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted." This is a far cry from state statutes which by their provisions negate the major goal of the federal program and the policies that induced that program, in this instance, "improving the quality of urban life * * * the most critical domestic program facing the United States." At bar, the federal aid had to be offered directly to the cities if the cities' ghetto areas and inhabitants were to be salvaged, and a state could not by its enactments, particularly in other unrelated contexts, stand effectively in the way of execution of that federal policy and program.

As was stated in the *Carleson* case, *supra*, with reference precisely to a federally-offered program (AFDC), where state acceptance was optional, but where the state sought to exclude from the AFDC coverage defendant children whose fathers were absent because of military service (406 U. S. at p. 600):

> "Section 402(a)(10) of the Social Security Act * * * places on each State participating in the AFDC program the requirement that 'aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.' 'Eligibility,' so defined, must be measured by federal standards. *King* v. *Smith*, 392 U. S. 309. * * * We held that Congress had defined 'parent' as a breadwinner who was legally obligated to support his children, and that Alabama was precluded from altering that federal standard. The importance of our holding was stressed in *Townsend* v. *Swank*, 404 U. S. 282, 286: '*King* v. *Smith*, establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under *federal* AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.' (Emphasis in original.)

Also (pp. 601-603):

> "*Townsend* involved * * * 42 U. S. C. §606(a)(2)(B), which includes in the definition of 'dependent children' those 'under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary [of HEW] a stu-

dent regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.' Illinois had defined AFDC eligible dependent children to include 18-20 year-old high school or vocational school children but not children of the same age group attending college. We held that §606(a)(2)(B) precluded that classification because it varied from the federal standard for needy dependent children. Involved in the present controversy is another eligibility criterion for federal matching funds set forth in the Act, namely the 'continued absence' of a parent from the home. If California's definition conflicts with the federal criterion then it, too, is invalid under the Supremacy Clause.

* * *

The presence of the parent in the home who has the legal obligation to support is the key to the AFDC program,* *King* v. *Smith*, 392 U. S., at 327; *Lewis* v. *Martin*, 397 U. S. 552, 559.

* * *

* * * We are especially confident Congress could not have designed an Act leaving uncared for an entire class who became 'needy children' because their fathers were in the Armed Services defending their country.

We hold that there is no congressional authorization for States to exclude these so-called military orphans from AFDC benefits."

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* As the uplifting of the local resident of the Model Cities area is the key to the Model Cities program.

6. The decision of the New York Court of Appeals threatens the destruction of a major aspect of the federal Model Cities program within the territorial limits of that most major urban center, the City of New York, in that the decision deprives residents of ghetto areas of the employment opportunities in municipal government which the Act was intended to provide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York, September 24, 1973.

Respectfully submitted,

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Decision and Order of Court of Appeals

[33 NY 2d 552]

Order reversed, without costs, on the opinion at Special Term and the judgment of Supreme Court, New York County, reinstated. All concur except Fuld, Ch. J., and Wachtler, J., who dissent and vote to affirm on the opinion at the Appellate Division.

Opinion of Appellate Division

MTR. OF MAYE v. LINDSAY [41 A D 2d 127]

STEVENS, P. J. The various petitioners, suing individually and as presidents of their respective organizations, commenced this article 78 proceeding to enjoin respondents from proceeding with a scheduled examination for positions as Aides Model Cities (M.C.) in the Fire and Police Departments and the Housing Authority, to enjoin the establishment of such positions, and to declare unlawful and unreasonable any actions of respondents to that end.

Petitioners-respondents (herein petitioners) obtained a stay at Special Term. This court, one Justice dissenting, modified to permit the examination to go forward but stayed the promulgation of any list or proposed acceptable answers. The dissenting Justice would have denied the stay entirely at the stage of the proceeding (*Matter of Maye* v. *Lindsay*, 37 A D 2d 803).

The proposed Aide (Model Cities) is a position with a starting salary of $5,750 per year and a maximum salary of $6,750. The duties in each category are fairly well defined. They do not include law enforcement or fire fighting authority. It is contemplated that at the end of six months the Aide will take or become eligible to take a promotion examination for Patrolman (Model Cities) or Fireman (Model Cities), etc. They are not promoted to any regular title in any of the services, but solely to an M.C. title. In neither instance does the Aide become a regular member of the force, nor is his salary paid from city funds.

It is requisite that each applicant for the title of Aide (M.C.) be a resident "of a Model Cities area at the time

of filng and must contnue to reside in the same Model Cities area during the period of employment in a Model Cities title." Three Model Cities areas were designated by New York City. They are low-income areas, the population of which is either largely black or Puerto Rican or a combination of both. The program is designed to assist young men (ages 16 to 27) in the areas to become Aides in the three categories.

The Model Cities Program, which is funded by Federal funds and supplemental grants, which, incidentally, may or may not be available, seeks to upgrade the total environment of the slum or blighted neighborhoods selected, and to afford to its residents "maximum opportunities for jobs in the projects and activities of the program." The authority for, purpose of and scope of the program is found in chapter 41 of title 42 of the United States Code (U. S. Code, tit. 42, §§3301-3313).

The cities engaging in the program are required to plan, develop and carry out comprehensive city demonstration programs in accordance with the purpose of the statute. The Secretary of Housing and Urban Development (HUD) is authorized to make grants and provide technical assistance to enable them to do so. The demonstration program becomes eligible for assistance if "substantive local laws, regulations, and other requirements are, or can be expected to be, consistent with the objectives of the program (U. S. Code, tit. 42, §3303, subd. [a], par. [4]).

Petitioners attacked the residency requirement as violative of the statutes and Constitution of the State of New York. The statutes upon which petitioners rely exempt policemen and firemen from residency requirements (Civil Service Law, §23, subds. 4-a, 4-b; Public Officers Law, §3, subds. 1, 2, 4 and 9; §30, subd. 4). Petitioners further attack the program as violative of section 6 of article V

of the New York State Constitution which requires appointments and promotions in the civil service to be by competitive examination. Special Term upheld petitioners and concluded that Congress has not excused compliance with what it concluded to be controlling provisions of State law. Special Term also invalidated the examination. Respondents appealed from the judgment entered.

The residency requirement applies only while the Aide is in an M.C. title. If successful in passing the initial examination and becoming an Aide (M.C.), the applicant can remain in that title a maximum of 15 months. In that period he must either successfully pass a second examination to policeman (M.C.), etc., or his employment is terminated. If successful, the applicant has taken two examinations and is not yet a policeman, fireman or Housing Authority patrolman. No program now exists for him to become such.

The fact is that the proposed Aides (M.C.) are not and may never become policemen, firemen or Housing Authority patrolmen. Essentially, in this respect, petitioners urge, and Special Term agreed, that the Aide M.C.) is a preparatory step to becoming one of the foregoing. As noted earlier, when, as and if an Aide ever became a regular fireman or policeman the residency requirement now applicable to an Aide would not apply. Petitioners are complaning before they are hurt. Their present action is premature. Certainly they are not not aggrieved. Nor is it shown that someone outside of the areas in question who fits the stated requirements, exclusive of residence, was denied any right to which he was entitled. The argument here is premised on anticipatory harm.

Aides (M.C.) are just what the word implies. They are persons designed to assist in the performance of certain

tasks. They are not to be armed or fight fires, and they are without the authority which the regular position carries. The provisions of the statute permitting and financing their creation are reasonably related to the express and desired goals. At this point they can hardly be considered competitive to the regular positions. They merely fill a need in a heretofore neglected area. Experimentation was and is warranted. Since the job categories created and the duties prescribed are completely different from any heretofore existing, the argument that they necessarily fall within the contemplation of the prohibitory statutes with respect to residency requirements, or the New York State Constitution with respect to competitive examinations, is of doubtful merit. We do not at this time pass upon any issue which might arise in the future when, conceivably, the lines of development merge.

In *Matter of Council of Supervisory Assns.* v. *Board of Educ. of City of N. Y.* (23 N Y 2d 458, 469) the court recognized and approved the "well-recognized power to create new positions for new needs" and to experiment in order to find solutions to urgent problems. Here, as in the cited case, no evasion of civil service requirements. The dire consequences envisaged by petitioners are not apparent. The judgment should be reversed, on the law, and the petition dismissed, without costs or disbursements.

Capozzoli, J. (dissenting). I most certainly approve of the objectives of the Model Cities Program and it is laudable indeed that it seeks to afford the residents of blighted neighborhoods "maximum opportunities for jobs in the projects and activities of the program". The particular program, which has led to the institution of this suit, will provide fine opportunities for young men in the age bracket 16 to 27 to prepare for their futures and it should be legally supported. The difficulty which is presented does not arise from the program, it arises out of the

obvious evasion by the City Civil Service Commission of the constitution requirement of appointments on the basis of merit and fitness. To say to other young men in the same age bracket that they cannot participate in this excellent program, because they do not live in a particular neighborhood is a complete abandonment of the principle of merit and fitness, discriminatory and unfair. It does not contribute to harmonious relations amongst the residents of our city and, indeed, is likely to create discord, dissension and unrest at a time when everyone is striving for peace and understanding.

Because of this and for all the reasons expressed by the trial court in its excellent opinion, I dissent.

NUNEZ and KUPFERMAN, JJ. concur with STEVENS, P. J.; CAPOZZOLI, J., dissents in an opinion, in which LANE, J., concurs.

Opinion of Special Term

[69 Miscellaneous Reports, 2d Series 276]

SAMUEL J. SILVERMAN, J. This is an article 78 proceeding to invalidate the actions of respondents in relation to the "Model Cities Program" to provide residents of Model Cities areas with preferential treatment in obtaining civil service appointments to the New York City Fire Department, Police Department, and Housing Authority Police, to enjoin respondents from establishing the titles of Aide (M. C.), Fireman (M. C.), Patrolman (M. C.) and Housing Patrolman (M. C.), and to restrain the administration of an examination for appointment to the title of Aide (M. C.). A basic objection to these examinations and titles is that they are open only to residents of Model Cities areas in the City of New York.

Petitioners sue both individually and as presidents of various organizations of policemen, firemen and Housing Authority patrolmen of the City of New York. Respondents are various city officials, including the Mayor, the Civil Service Commission, the Personnel Director of the city, the Police and Fire Commissioners, and the Chairman of the Housing Authority of the City of New York.

A preliminary injunction was granted by the Appellate Division permitting the disputed examination to go forward, but staying the promulgation of any resulting list or proposed acceptable answers, or any appointments based thereon, until the determination of this proceeding. (*Matter of Maye* v. *Lindsay*, 37 A D 2d 803 [1st Dept., Oct. 1, 1971].)

Chapter 41 of title 42 of the United States Code is entitled "Demonstration Cities and Metropolitan Development Program". Subchapter I (U. S. Code, tit. 42, §§3301-3313), headed "Comprehensive City Demonstration Pro-

grams", and the regulations promulgated thereunder, implement what is called the Model Cities Program.

Section 3301 contains the Congressional findings and declaration of purpose. The findings list the plethora of ills familiar to certain parts of our American cities; slums; concentration of poor people in certain areas; lack of housing and lack of services.

Under that statute, Federal moneys are made available to cities for Model Cities programs. The City of New York has applied for and presumably obtained funds to set up such a program.

As part of New York City's proposed program, the city designated three areas of the city as Model Cities areas—these being Central Brooklyn, Harlem—East Harlem, and South Bronx. Further, as part of the program, the City Civil Service Commission has created certain civil service titles, designated as "(Model Cities)" or "(M. C.)". Specifically, it has created the titles Police Aide (Model Cities), Patrolman (Model Cities), Police Trainee (Model Cities), Fire Aide (Model Cities), Fireman (Model Cities), Fire Trainee (Model Cities), Housing Police Aide (Model Cities), Patrolman N. Y. C. Housing Authority Police Department (Model Cities), Police Trainee N. Y. C. Housing Authority Police Department (Model Cities).

The examination announced was for the establishment of a single list for the various Aide (M. C.) positions from which appointments would be made by either the Police Department, Fire Department, or Housing Authority. Appointments to Aide titles are to be for a period not to exceed 15 months; Aides not promoted within the 15 months will be terminated. After six months, Aides will be eligible to compete in a promotion examination for the

respective positions of Patrolman (Model Cities), or, if under 21 years of age, Police Trainee (Model Cities); Fireman (Model Cities) or Fire Trainee (Model Cities); Patrolman New York City Housing Authority Police Department (Model Cities) or Police Trainee New York City Housing Authority Police Department (Model Cities).

A Trainee, upon attaining the age of 21, will mature to the Patrolman, Fireman or Patrolman New York City Housing Authority Police Department (Model Cities) titles. From the positions of Patrolman (Model Cities), Fireman (Model Cities) or Patrolman New York City Housing Authority Police Department (Model Cities) candidates will be eligible to compete in promotion examinations for regular higher ranks in the Police Department, Fire Department and New York City Housing Authority police service, i.e., presumably sergeant or higher.

The duties of a Police Aide (Model Cities) are stated to be: "Under close supervision of the Police Department, working in a Model Cities area, assists and works mainly in programs designed to develop closer understanding and cooperation between the community and the Police Department; assists departmental personnel assigned to Model Cities areas in the attainment of Department objectives". The duteis of the other Aides are similar.

The salaries of Aides will be $5,750 per year; the salaries of Patrolman (M. C.), Fireman (M. C.) and Patrolman New York City Housing Authority Police Department (M. C.) will apparently be the same as the salaries of the regular Patrolman, Fireman and Patrolman New York City Housing Authority Police Department, not (M. C.).

The commission has stated that the examination for Aide (M. C.) will be "less difficult than the regular entrance examination for Patrolman or Fireman", but that the

promotion examination to the uniformed titles will be an "equivalent examination" which will be "equivalent to the regular open competitive examination for Patrolman, Fireman or Patrolman NYCHAPD. In addition the test will be designed to measure those special traits and understanding which enhance their capability to function effectively in the Model Cities areas".

The commission ordered an open competitive examination for the title of Aide (M. C.). It published the following residence requirement: "Applicants must be residents of a Model Cities area at the time of filing and must continue to reside in the Model Cities area during the period of employment in a Model Cities title".

Petitioners attack the validity of the proposed examination on the ground that the commission has no authority to establish this residence requirement; that the examination, and particularly the residence requirement, is a violation of the constitutional requirement of appointments on the basis of merit and fitness; that the plan involves racial discrimination (what has been called "reverse discrimination"). Respondents dispute each of these contentions, and further contend that the requirements are valid under the Supremacy Clause of the United States Constitution.

A. *Requirement of Compliance with State Statutes*

Respondents argue that they are excused from compliance with otherwise controlling State statutes because of the Supremacy Clause of the Federal Constitution, and because of provisions of the applicable State statutes. I cannot accept either argument.

1. The Supremacy Clause of the United States Constitution (art. VI) provides in substance that the Constitution

and the laws of the United States shall be the supreme law of the land. As it relates to Federal statutes this provision results in overriding State statutes only when the Congress intends to override State statutes. Here, the Congress explicitly stated that it did not intend to override State statutes. Thus, section 3303 (subd. [a], par. [4]) of title 42 of the United States Code specifically provides that a comprehensive city demonstration program (i.e., a Model Cities program) is eligible for assistance under the act only if "substantive local laws, regulations, and other requirements are, or can be expected to be, consistent with the objectives of the program."

This requirement has been recognized in a bulletin issued by the United States Department of Housing and Urban Development in December 1967, which provides (p. 24): "If local or State laws and regulations present obstacles to achieving program goals, appropriate modifications should be sought."

I conclude that the Congress did not intend to override State legislation.

2. The authorizing State legislation does not excuse compliance with other State laws. Section 99-h of the General Municipal Law which authorizes municipalities to participate in Federal programs, such as the Model Cities program, provides that any municipal corporation shall have power to accept funds made available by the Federal Government "pursuant to the provisions of any federal law, which is not inconsistent with the statutes or constitution of this state" (subd. 2). And subdivision 4 of that section provides that "it is not intended by this section to repeal by implication any existing provision of law."

Accordingly, the city's program to be valid must comply with applicable State statutes.

B. *Lack of Compliance with State Statutes*

3. Petitioners contend that the residence requirement is a violation of sections 3 and 30 of the Public Officers Law. Section 3 of the Public Officers Law is entitled "Qualifications for holding office" and in general provides that "No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto * * * be * * * a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen * * * or within which his official functions are required to be exercised". The statute then goes on to make a number of exceptions to this requirement, of which the most significant for our purposes are subdivisions 2, 4 and 9. They provide in part as follows:

"2. Neither the provisions of this section nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a person as a member of the police force of any political subdivision or municipal corporation of the state if such person resides (a) in the county in which such political subdivision or municipal corporation is located; or "[various other counties within the city or state, essentially any county contiguous to the city or a county contiguous to a county within the city or less than 30 miles from the city]. * * *

"4. Except as otherwise provided in subdivision nine of this section, persons heretofore or hereafter employed

in the paid fire department of a city, town, village or fire district shall not be deemed to be holding a civil office or a local office within the meaning of this section and the provisions of this section shall not apply to such persons. The provisions of any general, special or local law, city or village charter, code or ordinance, or any rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised shall not apply to the appointment or continuance in office of any such person so employed, if such person resides in the county, or one of the counties, in which such political subdivision or municipal corporation is located. * * *

"9. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a paid member of the uniformed force of a paid fire department * * * of any city of over one million population who resides (a) in the county in which such city is located; or (b) in a county within the state contiguous to the county in which said city is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city."

Section 30 of the Public Officers Law entitled "Creation of vacancies" provides that: "Every office shall be vacant upon the happening of one of the following events * * *. d. His ceasing to be an inhabitant of the state, or if he

be a local officer, or the political subdivision, or municipal corporation of which he is required to be a resident when chosen". Again there are various exceptions of which the most important for our purposes are subdivisions 4 and 5 reading in part as follows: "4. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of a person who is a member of the police force of any political subdivision or municipal corporation of the state and who while a member of such force resides (a) in the county in which such political subdivision or municipal corporation is located; or" [various other counties somewhat analogous to the provision of subdivision 2 of section 3]. * * *

"5. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of a paid member of the uniformed force of a paid fire department * * * who resides (a) in the county in which said city is located; or" [various other counties somewhat analogous to the provision of subdivision 2 of section 3].

Respondents argue that these statutes merely create an exception to the residence requirement of sections 3 and 30 of the Public Officers Law and do not forbid the imposition by the Civil Service Commission of residence

requirements; that these exceptions are merely intended essentially to remove police and fire officer from the definition of public officers for this purpose. I cannot accept this argument. The fair meaning of these statutes is to permit police and fire officers to live in the specified areas outside the political subdivision in which they are to perform their functions. Subdivisions 2 and 9 of section 3 of the Public Officers Law and subdivisions 4 and 5 of section 30 create exemptions not only from the Public Officers Law requirement of residence applicable to public "officers" but also from "any general, special or local law, charter, code, ordinance, resolution, rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation" etc. Indeed the first sentence of subdivision 4 of section 3 read with subdivision 9 seems to be an almost explicit rejection of the contention that the statute merely means that fire officers of the City of New York are not public officers.

Again, subdivision 4-b of section 23 of the Civil Service Law is a rather persuasive indication that the Legislature did not intend to allow civil service commissions to impose residence requirements for police and fire officers in the City of New York. Section 23 by its terms does not apply to the City of New York (subd. 5) but in authorizing other cities to require residence in a geographically defined area which is a portion of such city, for positions in that area where required in order to qualify for Federal moneys, there is an express exception for "those eligibles on policemen and firemen lists".

I think the provisions of subdivisions 2 and 9 of section 3 of the Public Officers Law, and subdivisions 4 and 5 of section 30 of the Public Officers Law do not apply literally to the position of Aide (M. C.). Thus, subdivision 2 of

section 3 and subdivision 4 of section 30 refer to "a member of the police force"; subdivision 9 of section 3 and subdivision 5 of section 30 refer to "a paid member of the uniformed force of a paid fire department".

An Aide (M. C.) is not, I think, either a member of the police force or a paid member of the uniformed force of a paid fire department. But the position of Aide (M. C.) is merely a preparatory position. The whole point of the creation of the position of Aide (M. C.) is eligibility for promotion to Patrolman (M. C.) or Fireman (M. C.) or Patrolman New York City Housing Authority, Police Department (M. C.), and indeed, further eligibility for promotion to the higher ranks of the uniformed police and fire departments. (I think a Patrolman of the New York City Housing Authority Police Department is "a member of the police force of any * * * municipal corporation of the state" within the meaning of sections 3 and 30 of the Public Officers Law. Cf. Public Housing Law, §§401, 402, subd. 5.) Unless the promotion takes place within 15 months, the position of Aide (M. C.) is terminated.

If, as I think, the requirement of residence within the Model Cities area invalidates provisions for promotion to the various Patrolman (M. C.) and Fireman (M. C.) positions, then the whole plan for Model Cities positions in the city civil service limited to residents within the Model Cities area fails.

I express no opinion as to the power of the heads of the various departments to assign to duties within the various Model Cities areas any regularly appointed patrolmen and firemen who may reside in those areas.

4. Quite apart from the special provisions of sections 3 and 30 of the Public Officers Law forbidding residence

requirements for policemen and firemen more restrictive than those set forth in the statutes, I think the requirement of residence within the Model Cities area in the circumstances of this case violates the constitutional and statutory civil service requirements for appointments based on merit and fitness to be determined by competitive examinations, as far as practicable.

The basic civil service requirement is contained in section 6 of article V of the State Constitution, reading in part as follows: "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive;" (with exceptions not here relevant).

5. Respondents suggest that the residence requirement is somehow related to the desirability that the appointee shall have a special sensitivity to, understanding of, and experience with problems of the Model Cities areas. Petitioners contend that the residence requirement is merely a means of assuring that jobs shall go to a particular group —residents of the Model Cities areas.

I cannot accept the argument that the residence requirement can be justified on merit and fitness grounds because of the special sensitivity, understanding and experience required. I do not think it can rationally be contended that a person who has lived in the area all his life and moved to an adjoining area the day before the test, is less sensitive to, understanding of, or experienced with the problems of the area than a person who has never lived in the area, but moved in the day before the test; yet the latter is qualified to take the test and the former is not.

If, as respondents contend, these qualities of special sensitivity, understanding and experience can be objectively tested for, then they should be; and respondents say they will be. But to require residence within the Model Cities areas at the time of examination is not, I think, objectively related to those qualities. Rather, it is a means of affording employment to residents of the areas in preference—perhaps justifiable preference—to nonresidents of the areas. Indeed, that is one of the objectives of the Model Cities programs. The Corporation Counsel explicitly states that "The program here under attack was necessary in order to '[provide] maximum opportunities for employing residents of the areas in all phases of the program.' "

Respondents rely heavily on *Matter of Council of Supervisory Assns. v. Board of Educ. of City of N. Y.* (23 N Y 2d 458 [1969]). In that case the Court of Appeals held that the Board of Education of the City of New York could make temporary appointments to the position of principal of demonstration schools, not from the regular existing school principals' list, on the ground that the position of principal of the demonstration elementary schools required qualifications different from those for the regular principals' job, including among other things, experience with the race problems in relation to education and experience with community relations. The court explicitly made the distinction that it was the difference in the job that made the existing list inapplicable and that these additional requirements would have to be tested for by "specific and objective criteria of experience in the area of community-education programs." (p. 468). The Court of Appeals said (p. 469): "This decision * * * is limited to a well-recognized power to create new positions for new needs and to fill them temporarily until lists based on examinations can be

promulgated. The court will not permit such a procedure to be used as a device for evasion of the civil service requirements".

Thus the various civil service commissions of the State have power to define jobs and to state and test for the requirements for the jobs. But they cannot decide that what they wish to do is to give employment to particular persons or particular groups, and fit the requirements for the jobs to those groups. Here it is quite plain—it is indeed one of the express objectives of the program—that it is desired to give employment to residents of the Model Cities area and therefore the examinations are limited to such residents. This may be a very desirable thing to do. But I think it runs counter to the basic State constitutional requirement that "appointments and promotions in the civil service * * * shall be made according to merit and fitness."

6. Petitioners argue that the residence requirement involves reverse racial discrimination because the residents of the Model Cities area are largely Black or Spanish-speaking. The Court of Appeals in the *Council of Supervisory Assns.* case (*supra*) said: "The position could not lawfully be filled on the basis of race" (p. 467). "Race or religion cannot, as qualifying factors, constitutionally be considered but experience can be considered" (p. 468).

There are some statements by the Administrator of the Model Cities Policy Administration of the city which seem to lend some support to petitioners' contention, e.g., in a letter dated September 21, 1971, to the Assistant National Administrator, the City Administrator, Mr. Williams, states: "Rigid Civil Service requirements have been the major impediment to increasing the number of Blacks and

Puerto Ricans in the Police and Fire Departments. Thus, we believe our proposal is consistent with the intent of the Model Cities enabling legislation since it represents an important step in modifying those unfair requirements."

If the civil service requirements are unfair they should of course be corrected by appropriate changes in the examinations. But I do not think this justifies imposing residence requirements. Perhaps it is enough as to this aspect of the case to again quote the Court of Appeals in the *Council of Supervisory Assns.* case (p. 467): "The fact some proponents of experimental changes argued this would mean selection only from members of the ethnic groups themselves, as this record suggests, is not decisive. Nor is this viewpoint controlling on the board. This is not the basis on which the new position was described and promulgated in the official records of the board."

7. This is not the first time that an effort has been made by civil service commissions to limit appointment to residents of particular areas less than the political subdivision in which they are appointed, and to do so without statutory authority. Such efforts have uniformly been declared invalid on the ground that the only residence requirement that can be imposed without express statutory authority is a residence requirement not more restrictive than a recognized political subdivision of the State. So it was held in *People ex rel. Melledy* v. *Shea* (73 App. Div. 232, 235-236 [1st Dept., 1902]) where the court said: "It is not difficult to see that if the commission had power to subdivide a given locality into as many districts as it saw fit, and then by rules of its own adoption make an applicant ineligible to appointment to a position except in the district in which he resided at the time the application was made,

how the object sought to be accomplished by the statute would be entirely defeated and the statute, in effect, repealed."

Indeed, where appointment is to a city-wide department, a requirement (without statutory authority) of residence within a particular borough for jobs within that borough is invalid. (*People ex rel. Franklin* v. *Fetherston*, 168 App. Div. 416 [2d Dept., 1915].)

8. For the reasons stated, I think that in the circumstances of this case the requirement of residence is invalid.

Of course, even the constitutional requirement of merit and fitness (much less the statutory restriction on residence requirements) was not handed down on Mount Sinai. There is room for systems of values in which other considerations may even outweigh the constitutional requirement of appointments based on merit and fitness. (Indeed, the constitutional exception "as far as practicable" is to some extent a recognition of this fact; but "practicable" is not a synonym for "advisable".) Whether some other ends and values outweigh the requirement of merit and fitness or the statutory restriction on residence requirements is a question of policy to be determined by those to whom such decisions are confided—the people of the State, the Legislature, and perhaps the Congress—and the State Constitution and the applicable statutes are the definitive and binding expression of those policy determinations. The present statutes of this State I think forbid the residence requirement sought to be imposed.

Accordingly, the petition is granted to the extent of invalidating the examinations for Aide (Model Cities) and the requirement in connection therewith of residence in the Model Cities areas.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution, Article 6, Clause 2, Supreme Law of Land.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

Chapter 41 of Title 42, U. S. Code:

> "§3301. *Congressional findings and declaration of purpose*
>
> The Congress hereby finds and declares that improving the quality of urban life is the most critical domestic problem facing the United States. * * *
>
> The Congress further finds and declares that cities, of all sizes, do not have adequate resources to deal effectively with the critical problems facing them, and that Federal assistance in addition to that now authorized by the urban renewal program and other existing Federal grant-in-aid programs is essential to enable cities to plan, develop, and conduct programs to improve their physical environment * * * and provide educational and social services vital to health and welfare.
>
> The purposes of this subchapter are to provide additional financial and technical assistance to enable cities of all sizes (with equal regard to the problems of small as well as large cities) to plan,

develop, and carry out locally prepared and scheduled comprehensive city demonstration programs containing new and imaginative proposals to rebuild or revitalize large slum and blighted areas; to expand housing, job and income opportunities; to reduce dependence on welfare payments; to improve educational facilities and programs; * * * to reduce the incidence of crime and delinquency; * * * to establish better access between homes and jobs; * * * and to accomplish these objectives through the most effective and economical concentration and coordination of Federal, State, and local public and private efforts to improve the quality of urban life."

* * *

"§3303. *Eligibility for assistance; implementation of programs; analyses and programming systems; transfer of pupils*

(a) A comprehensive city demonstration program is eligible for assistance under sections 3305 and 3307 of this title only if—

* * *

(2) the program is of sufficient magnitude to make a substantial impact on the physical and social problems and to remove or arrest blight and decay in entire sections or neighborhoods; * * * to make marked progress in reducing social and educational disadvantages * * * underemployment and enforced idleness; and to provide * * * widespread citizen participation in the program, maximum opportunities for employing residents of the area in all

phases of the program, and enlarged opportunities for work and training;

* * *

(4) * * * substantive local laws, regulations, and other requirements are, or can be expected to be, consistent with the objectives of the program; * * * agencies whose cooperation is necessary to the success of the program have indicated their intent to furnish such cooperation; * * *

(5) the program meets such additional requirements as the Secretary may establish to carry out the purposes of this subchapter:

* * *

(b) In implementing this subchapter the Secretary shall—

(1) emphasize local initiative in the planning, development, and implementation of comprehensive city demonstration programs;"

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the State of New York

Article 5, §6. Civil Service appointments and promotions;

"Appointments and promotions in the civil service of the State and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive * * *."

New York Civil Service Law.

"§23. * * * certification of * * * municipal eligible lists

* * *

4-a. Residence restrictions for local positions. The state civil service department or municipal commission having jurisdiction over positions in a city or civil division, may require that candidates for examination for appointment to any such positions be residents of such city or civil division, or residents of the county or judicial district in which such city or civil division is located, or of any reasonable combination of political subdivisions both in and outside of New York state contiguous to such city or civil division or contiguous to the political subdivision in which such city or civil division is located. An appointing authority of a department or agency of a city or civil division may require that eligibles who are residents of such city or civil division shall be certified first for appointment, provided, however, no such preference shall be given on appointments from promotion lists. Upon exhaustion

of the list of such resident eligibles, certifications shall be made from the whole eligible list. This subdivision shall not be deemed to supersede any general or special law pertaining to residence qualifications of local officers or employees.

4-b. Geographic certification based on need. A municipal commission having jurisdiction over a city or civil division may provide that eligibles, other than those eligibles on policemen and firemen lists, who are residents of a geographically-defined area which is a portion of such city or civil division shall be certified first for appointment to positions in such area where in order to qualify for federal moneys such certification is required. Upon exhaustion of the list of such resident eligibles, certifications shall be made from the whole eligible list.

5. Construction. The provisions of this section shall not apply to the municipal commission of any city containing more than one county."

New York Public Officers Law.

§3. Qualifications for holding office.

1. No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, have attained the age of eighteen years * * * be a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen, or within which the electors electing him reside, or within which his official functions are required to be exercised * * *.

State Constitutional and Statutory Provisions Involved

2. Neither the provisions of this section or of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a person as a member of the police force of any political subdivision or municipal corporation of the state if such person resides (a) in the county in which such political subdivision or municipal corporation is located; or (b) in a county within the state contiguous to the county in which such political subdivision or municipal corporation is located; or (c) in a county within the state contiguous to such political subdivision or municipal corporation; or (d) in a county within the state contiguous to a county described in item (c) hereof where the former is less than fifteen miles from such political subdivision or municipal corporation, measured from their respective nearest boundary lines; or (e) in a county within the state contiguous to a county described in item (d) hereof where the former is less than thirty miles from such political subdivision or municipal corporation, measured from their respective nearest boundary lines.

* * *

4. Except as otherwise provided in subdivision nine of this section, persons heretofore or hereafter employed in the paid fire department of a city, town, village or fire district shall not be deemed to be holding a civil office or a local office within the meaning of this section and the provisions of this

section shall not apply to such persons. The provisions of any general, special or local law, city or village charter, code or ordinance or any rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised shall not apply to the appointment or continuance in office of any such person so employed, if such person resides in the county, or one of the counties, in which such political subdivision or municipal corporation is located.

* * *

9. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a paid member of the uniformed force of a paid fire department or to the appointment of any person employed in a department of correction in the correction service classification of the classified civil service, or to the appointment of officers and inspectors who are employees of a department of health of any city of over one million population who resides (a) in the county in which such city is located; or (b) in a county within the state contiguous to the county in which said city is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city.

State Constitutional and Statutory Provisions Involved

§30. Creation of vacancies.

1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:

* * *

d. His ceasing to be an inhabitant of the state, or if he be a local officer, of the political subdivision, or municipal corporation of which he is required to be a resident when chosen;

* * *

4. Neither the provisions of this section, nor of any general, special or local law * * * rule or regulation, creating a vacancy in a local office of a * * * municipal corporation if the incumbent thereof ceases to be a resident of such * * * municipal corporation, shall apply in the case of a person who is a member of the police force of any * * * municipal corporation of the state and who while a member of such force resides (a) in the county in which such * * * municipal corporation is located; or (b) in a county within the state contiguous to the county in which such * * * municipal corporation is located; or (c) in a county within the state contiguous to such * * * municipal corporation; or (d) in a county within the state contiguous to a county described in item (c) hereof where the former is less than fifteen miles from such * * * municipal corporation, measured from their respective nearest boundary lines; or (e) in a county within the state contiguous to a county described in item (d) hereof where the former is less than thirty miles from such * * * municipal corporation, measured from their respective nearest boundary lines:

* * *

State Constitutional and Statutory Provisions Involved

5. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a * * * municipal corporation if the incumbent thereof ceases to be a resident of such * * * municipal corporation, shall apply in the case of a paid member of the uniformed force of a paid fire department, or in the case of a person employed in a department of correction in the correction service of the classified civil service, or in the case of officers and inspectors employed in a department of health of a city of over one million population who resides (a) in the county in which said city is located; or (b) in a county within the state contiguous to the county in which such city is located."

OPPOSITION BRIEF

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IN THE

Supreme Court of the United States

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1973

No. 73-555

JOHN V. LINDSAY, as Mayor of the City of New York, THE CITY OF NEW YORK, CITY CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, HARRY I. BRONSTEIN, as Personnel Director of the City of New York and as Chairman of such Commission, MILTON SAMORODIN, JAMES W. SMITH, Members of such Commission, PATRICK V. MURPHY, as Police Commissioner of the City of New York, ROBERT O. LOWERY, as Fire Commissioner of the City of New York,

Petitioners,

against

MICHAEL J. MAYE, Individually, and as President of Uniformed Firefighters Association, Local 94, International Association of Firefighters, AFL-CIO, UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, EDWARD J. KIERNAN, Individually and as President of Patrolmen's Benevolent Association of the City of New York, Inc., PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., HAROLD H. MELNICK, Individually and as President of Sergeant's Benevolent Association of the New York City Police Department, SERGEANT'S BENEVOLENT ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, JAMES T. KELLY, Individually and as President of Detectives Endowment Association, Police Department, City of New York, Inc., DETECTIVES ENDOWMENT ASSOCIATION, POLICE DEPARTMENT, CITY OF NEW YORK, INC., VINCENT A. COOKE, Individually and as President of Lieutenant's Benevolent Association, LIEUTENANT'S BENEVOLENT ASSOCIATION, RAYMOND W. GIMMLER, Individually and as President of Uniformed Fire Officers Association, Local 854, International Association of Firefighters, AFL-CIO, UNIFORMED FIRE OFFICER'S ASSOCIATION, LOCAL 854, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, JOSEPH L. BALZANO, Individually and as Fresident of New York City Housing Patrolmen's Benevolent Association, Inc., NEW YORK CITY HOUSING PATROLMEN'S BENEVOLENT ASSOCIATION, INC., TIMOTHY O'SULLIVAN, ROBERT CUNNINGHAM, and THOMAS ALBERT DOUGHERTY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Question Presented	2
Federal Constitutional and Statutory Provisions Involved	4
State Constitutional and Statutory Provisions Involved	4
Statement of Facts	9
Argument	11
I. This is not a case under the Supremacy Clause in which federal action supersedes state action, —whether or not conflicting,—by reason of preemption of an area by the Congress since the Model Cities Act, 42 U.S.C. § 3303(a) (4), mandates federal deference to, not supersession of, state law	12
II. New York State's highest court has authoritatively construed the New York State Constitution, Article 5, § 6, and the applicable New York statutes, Gen. Munic. Law § 99-h (2) and (4), and Pub. Officers Law §§ 3 and 30, to prohibit the imposition of local residency requirements for positions in New York City's Uniformed Forces	15
III. There is no federal or constitutional issue presented here since Congress, by providing that Model Cities programs must comply with state law, explicitly refused to exhaust the full reach of its power under the Supremacy Clause; in any event, in the absence of preemption, local action otherwise constitutionally authorized cannot be invalidated under the Supremacy Clause unless clearly and unambiguously in conflict with federal action and accommodation is not feasible	18

PAGE

Conclusion 21

Decision and Order of Court of Appeals [33 N. Y. 2d 552] 22

Opinion of Appellate Division [41 A. D. 2d 127] 22

Opinion of Special Term [69 Misc. 2d 276] 26

Decision and Order of Appellate Division [37 A. D. 2d 803] 39

TABLE OF CASES

California v. *Zook*, 336 U.S. 725 (1949) 18, 19

Florida Lime and Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 19, 20

Kelly v. *Washington*, 302 U.S. 1 (1937) 19

Maurer v. *Hamilton*, 309 U.S. 598 (1940) 19

Penn Dairies, Inc. v. *Milk Control Comm'n of Pennsylvania*, 318 U.S. 261 (1943) 19

Perez v. *Campbell*, 402 U.S. 637 (1971) 15

Seagram and Sons, Inc. v. *Hostetter*, 384 U.S. 35 (1966) 20

STATUTES

Federal

Agricultural Marketing Agreement Act of 1937 20

Model Cities Act, 42 U.S.C. §§ 3301-13 .....2, passim

Model Cities Act, 42 U.S.C. § 3303(a)(4) 3, 12, 18, 19

United States Constitution, Art. 6, Cl. 2 3

PAGE

State

New York Civil Service Law, § 23(4) 3, 5, 14

New York Civil Service Law, § 23(4)(b) (L. 1971, c. 785) 14

New York General Municipal Law, § 99-h(2) and (4) 3, 4, 15

California Agricultural Code 20

New York Public Officers Law, § 3 .....3, 6, 7, 8, 15, 16

New York Public Officers Law, § 3(2) 16, 17

New York Public Officers Law, § 3(9) 17

New York Public Officers Law, § 30 .....3, 8, 9, 15

New York Public Officers Law, § 30(4) 17

New York Public Officers Law, § 30(5) 17

New York State Constitution, Art. 5, § 6 .....3, 4, 15, 16

OTHER AUTHORITIES

Joint Conference Committee Report, 3 U.S. Code Cong. and Admin. News 4009-10 (1966) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

JOHN V. LINDSAY, as Mayor of the City of New York, THE CITY OF NEW YORK, CITY CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, HARRY I. BRONSTEIN, as Personnel Director of the City of New York and as Chairman of such Commission, MILTON SAMOOHIN, JAMES W. SMITH, Members of such Commission, PATRICK V. MURPHY, as Police Commissioner of the City of New York, ROBERT O. LOWERY, as Fire Commissioner of the City of New York,

Petitioners,

against

MICHAEL J. MAYE, Individually, and as President of Uniformed Firefighters Association, Local 94, International Association of Firefighters, AFL-CIO, UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, EDWARD J. KIERNAN, Individually and as President of Patrolmen's Benevolent Association of the City of New York, Inc., PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., HAROLD H. MELNICK, Individually and as President of Sergeant's Benevolent Association of the New York City Police Department, SERGEANT'S BENEVOLENT ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, JAMES T. KELLY, Individually and as President of Detectives Endowment Association, Police Department, City of New York, Inc., DETECTIVES ENDOWMENT ASSOCIATION, POLICE DEPARTMENT, CITY OF NEW YORK, INC., VINCENT A. COOKE, Individually and as President of Lieutenant's Benevolent Association, LIEUTENANT'S BENEVOLENT ASSOCIATION, RAYMOND W. GIMMLER, Individually and as President of Uniformed Fire Officers Association, Local 854, International Association of Firefighters, AFL-CIO, UNIFORMED FIRE OFFICER'S ASSOCIATION, LOCAL 854, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, JOSEPH L. BALZANO, Individually and as President of New York City Housing Patrolmen's Benevolent Association, Inc., NEW YORK CITY HOUSING PATROLMEN'S BENEVOLENT ASSOCIATION, INC., TIMOTHY O'SULLIVAN, ROBERT CUNNINGHAM, and THOMAS ALBERT DOUGHERTY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondents respectfully pray that a writ of certiorari not issue to review the final decision and order of the Court of Appeals of the State of New York, rendered on July 2, 1973, that reversed the order of the Appellate Division of the Supreme Court of the State of New York, First

Judicial Department, entered on March 8, 1973, and reinstated the final judgment of the Supreme Court of the State of New York, County of New York, entered on April 18, 1972.

Opinions Below

On October 1, 1971, the New York State Supreme Court, Appellate Division, First Department, while permitting petitioners herein to administer a civil service examination for appointments and promotions to policemen and firemen positions, stayed the promulgation of any resulting list, or proposed acceptable answers, or any appointments based thereon, pending a full hearing before Special Term and adjudication of the matter by such Appellate Division upon an adequate record. 37 A.D.2d 803 (1st Dept., 1971). On April 18, 1972, Special Term granted the relief sought by respondents herein, invalidating the examination previously administered and declaring unlawful the residence requirement set forth in the notice of examination, on the grounds that the plan promulgated by the petitioners herein violated the Constitution and Laws of the State of New York. 69 Misc.2d 276 (Sup. Ct., N.Y. Co., 1972).

Thereafter, the Appellate Division, First Department, reversed the judgment entered by Special Term on the sole ground that the relief sought by respondents herein was premature. 41 A.D.2d 127 (1st Dept. 1973). On June 4, 1973, the Court of Appeals reversed the Appellate Division on the opinion of Special Term. 33 N.Y.2d 552.

Question Presented

Is there any federal Supremacy Clause issue involved in the instant case when Congress provided in the Model Cities Act that a program is eligible for federal assistance only if "substantive local laws . . . are . . . consistent

with the objectives of the program . . .," 42 U.S.C. § 3303(a) (4), and New York State's highest court has authoritatively ruled that local residency requirements for the positions of "Police Aid (Model Cities)," "Fire Aid (Model Cities)" and "Housing Police Aid (Model Cities)" in New York City's proposed Model Cities program are in violation of the New York State Constitution, Art. 5, § 6, and the applicable New York statutes, Gen. Munic. Law § 99h (2) and (4), Pub. Officers Law §§ 3 and 30, and Civ. Serv. Law § 23 (4)?

Federal Constitutional and Statutory Provisions Involved

U.S. Const., Art. 6, Cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Chapter 41 of Title 42 U.S. Code:

> **"§ 3303. Eligibility for assistance; implementation of programs; analyses and programing systems; transfer of pupils**
>
> (a) A comprehensive city demonstration program is eligible for assistance under sections 3305 and 3307 of this title only if— . . . .
>
> (4) . . . . substantive local laws, regulations, and other requirements are, or can be expected to be, consistent with the objectives of the program; . . . ."

State Constitutional and Statutory Provisions Involved

N.Y. Const. Art. 5, § 6:

"Appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as pratcicable, shall be competitive. . . ."

N. Y. Gen. Munic. Law:

"§ 99-h. Participation in federal programs

• • •

2. Any municipal corporation shall have power, either individually or jointly with one or more other municipal corporations, to apply for, accept and expend funds made available by the federal government either directly or through the state, pursuant to the provisions of any federal law, which is not inconsistent with the statutes or constitution of this state, in order to administer, conduct or participate with the federal government in programs relating to the general welfare of the inhabitants of such municipal corporation. . . .

• • •

4. The provisions of this section shall be an addition to and not in substitution for or in limitation of any other authorization to apply for, accept and expend funds made available by the federal government either directly or through the state, and it is not intended by this section to repeal by implication any existing provision of law."

N.Y. Civ. Serv. Law:

"§ 23. . . . . certification of . . . municipal eligible lists

* * *

4-a. Residence restrictions for local positions. The state civil service department or municipal commission having jurisdiction over positions in a city or civil division, may require that candidates for examination for appointment to any such positions be residents of such city or civil division, or residents of the county or judicial district in which such city or civil division is located, or of any reasonable combination of political subdivisions both in and outside of New York state contiguous to such city or civil division or contiguous to the political subdivision in which such city or civil division is located. An appointing authority of a department or agency of a city or civil division may require that eligibles who are residents of such city or civil division shall be certified first for appointment, provided, however, no such preference shall be given on appointments from promotion lists. Upon exhaustion of the list of such resident eligibles, certifications shall be made from the whole eligible list. This subdivision shall not be deemed to supersede any general or special law pertaining to residence qualifications of local officers or employees.

4-b. Geographic certification based on need. A municipal commission having jurisdiction over a city or civil division may provide that eligibles, other than those eligibles on policemen and firemen lists, who are residents of a geographically-defined area which is a portion of such city or civil division shall be certified first for appointment to positions in such area where in order to qualify for federal moneys such certification is required. Upon exhaustion of the list of such resident eligibles, certifications shall be made from the whole eligible list.

5. Construction. The provisions of this section shall not apply to the municipal commission of any city containing more than one county."

N.Y. Pub. Officers Law:

"§ 3. Qualifications for holding office

1. No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, have attained the age of eighteen years, be a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen, or within which the electors electing him reside, or within which his official functions are required to be exercised. . . .

2. Neither the provisions of this section or of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a person as a member of the police force of any political subdivision or municipal corporation of the state if such person resides (a) in the county in which such political subdivision or municipal corporation is located; or (b) in a county within the state contiguous to the county in which such political subdivision or municipal corporation is located; or (c) in a county within the state contiguous to such political subdivision or municipal corporation; or (d) in a county within the state contiguous to a county described in item (c) hereof where the former is less than fifteen miles from such political subdivision or municipal corporation, measured from their respective nearest boundary lines; or (e) in a

ployees of a department of health of any city of over one million population who resides (a) in the county in which such city is located; or (b) in a county within the state contiguous to the county in which said city is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city."

N.Y. Pub. Officers Law:

"§ 30. Creation of vacancies

1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:

• • •

d. His ceasing to be an inhabitant of the state, or if he be a local officer, of the political subdivision, or municipal corporation of which he is required to be a resident when chosen;

• • •

4. Neither the provisions of this section, nor of any general, special or local law . . . rule or regulation, creating a vacancy in a local office of a . . . municipal corporation if the incumbent thereof ceases to be a resident of such . . . municipal corporation, shall apply in the case of a person who is a member of the police force of any . . . municipal corporation of the state and who while a member of such force resides (a) in the county in which such . . . municipal corporation is located; or (b) in a county within the state contiguous to the county in which such . . . municipal corporation is located; or (c) in a county within the state contiguous to such . . . municipal corporation; or (d) in a county within the state contiguous to a county described in item (c) hereof where the former is less than fifteen miles from such . . . municipal cor-

poration, measured from their respective nearest boundary lines; or (e) in a county within the state contiguous to a county described in item (d) hereof where the former is less than thirty miles from such . . . municipal corporation, measured from their respective nearest boundary lines:

• • •

5. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a . . . municipal corporation if the incumbent thereof ceases to be a resident of such . . . municipal corporation, shall apply in the case of a paid member of the uniformed force of a paid fire department, or in the case of a person employed in a department of correction in the correction service of the classified civil service, or in the case of officers and inspectors employed in a department of health of a city of over one million population who resides (a) in the county in which said city is located; or (b) in a county within the state contiguous to the county in which such city is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city; or (e) in a county within the state contiguous to a county described in item (d) hereof where the former is less than thirty miles from such political subdivision or municipal corporation, measured from their respective boundary lines."

Statement of Facts

In 1971 petitioners conceived a plan to provide residents of certain Model Cities areas in New York City with preferential treatment in order for them to gain access to the Police and Fire Departments of the City of New

York (hereinafter "Uniformed Forces"). The plan was also designed to guarantee such residents advancement through the ranks of the Uniformed Forces (R. 48).*

The plan which petitioners designed and then submitted to the Secretary of the Department of Housing and Urban Development (hereinafter "HUD") for the purpose of obtaining funds pursuant to the Model Cities Act, 42 U.S.C. §§ 3301-13, called for a civil service examination to be administered only to residents of the Model Cities areas for positions in the Uniformed Forces (the Model Cities positions are hereinafter referred to as "M.C."). Upon being appointed to the initial position, Aid M.C., each appointee would then be eligible for advancement to the next civil service position, Patrolman M.C., or Fireman M.C., (hereinafter collectively referred to as "Uniformed Forces M.C."). In order to be eligible to take either an Aid M.C. examination or a Uniformed Forces M.C. Examination, as well as to retain each appointed position after passing each examination, one had to be a resident of a Model Cities area. The incumbents of the Uniformed Forces M.C. titles would be eligible to compete with all other Firemen, Patrolmen, and Housing Patrolmen, respectively for promotion within their departments (R. 48).

Respondents herein include both the line organizations and the superior officers organizations of the New York City Fire Department, Police Department, and Housing Authority Patrolmen. Respondents also include various individuals in their capacities as the Presidents of each of the organizations and as citizens of the State of New York.

The proposed New York City plan limiting eligibility to positions within the Uniformed Forces to Model Cities residents has not been utilized elsewhere, although over

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* R refers to the Record on Appeal before the New York courts.

150 cities and counties in 45 states, the District of Columbia and Puerto Rico have received Model Cities grants (R48, Exhibit 1, p. 15). As characterized by petitioners, the proposed plan was "unprecedented" (R158, Exhibit 3, p. 1). It must be emphasized that there were numerous alternatives available to petitioners by which they could have increased the number of Model Cities residents employed by the Uniform Forces without running afoul of New York law. Respondents, themselves, proposed a program under which Model Cities residents could receive special educational assistance to enable them to pass competitive examinations (R32). Other cities in New York State (R85), and New York City itself (R156), have managed to develop Model Cities programs which conform to both Federal and State Law.

New York's highest court, the Court of Appeals, ruled in favor of respondents herein, finding that the New York State Constitution and various New York statutes prohibit local residency requirements for members of New York City's Fire Department, Police Department and Housing Authority. Since the federal legislation providing for Model Cities programs requires conformity with local law there is no violation of the federal Supremacy Clause.

Argument

All parties agree, as a matter of basic constitutional law, that Congress by operation of the Supremacy Clause can override and supersede state law. In the instant case the New York Court of Appeals found that Special Term was correct in its determination that the residency requirements imposed by respondents in their plan to provide jobs in New York City's Uniformed Forces for residents of Model Cities areas violated the Constitution and laws of the State of New York. Accordingly, since New York's highest court has authoritatively construed that state's

Constitution and relevant statutes, and since petitioners rely upon such construction to support their Supremacy Clause claim, the sole issue herein is whether by enactment of the Model Cities legislation Congress intended to override state law in respect to examinational residency requirements.

I.

This is not a case under the Supremacy Clause in which federal action supersedes state action,—whether or not conflicting,—by reason of pre-emption of an area by the Congress since the Model Cities Act, 42 U.S.C. § 3303(a)(4), mandates federal deference to, not supersession of, state law.

Petitioners purport to find in the Model Cities legislation the necessary congressional mandate and authorization to permit an examination which excludes non-Model Cities residents, even if such exclusion is contrary to state law. The paradox of petitioners' argument is that it derives its momentum from the very federal statute and administrative interpretations which expressly disallow the intent attributed by petitioners.

Congress in the Model Cities Act specifically provided:

> "A comprehensive City demonstration program is eligible for assistance under sections 3305 and 3307 *only if*—. . . .
>
> (4) . . . . substantive local laws, regulations and other requirements are or can be expected to be consistent with the objectives of the program . . . ." 42 U.S.C. § 3303 (a) (4) [Emphasis added].

The Joint Conference Committee Report which provides the basic legislative history of the Model Cities Act is equally

explicit that all Model Cities programs are necessarily subject to local and state law.

> "[T]he criteria require that . . . (5) local laws, regulations, and other requirements are, or can be expected to be consistent with the objectives of the program." 3 U.S. Code Cong. and Admin. News 4009-10 (1966).

The intent of Congress with respect to such legislation is supported by administrative interpretation. HUD in its directive to applicants for financial assistance advises that:

> "If local or State laws and regulations present obstacles to achieving program goals appropriate modifications should be sought." R. 80, Exhibit E, p. 24.

Furthermore, the Assistant Secretary of Housing and Urban Development has stated that:

> "[W]e [HUD] have consistently required the Cities to adopt their own appropriate strategies to assure the employment of Model Neighborhood Residents in all phases of the program. The specific mechanics which cities might adopt are left to local initiatives *subject to applicable statutes.*" [Emphasis added] R. 122, Exhibit A.

The conclusion is inescapable. The very words of the Model Cities Act, the Joint Conference Committee Report, and HUD's administrative interpretations all prove that Congress did not intend to override state legislation. An applicant for federal assistance under the Model Cities Act must do one of two things; it must either design a plan which is consistent with state and local law or, if it designs a plan which is inconsistent with state or local law, it must seek to amend or repeal any inconsistent statutes.

An instance of the latter occurred in June of 1971 when, with the Model Cities Act specifically in mind, the New York

State Legislature amended § 23(4) of the New York State Civil Service Law by adding thereto subdivision b (L. 1971, c.785), which provides as follows:

> "Geographic certification based on need. A municipal commission having jurisdiction over a city or civil division may provide that eligibles, other than those eligibles on policemen and firemen lists, who are residents of a geographically-defined area which is a portion of such city or civil division shall be certified first for appointment to positions in such area where in order to qualify for federal monies such certification is required. Upon exhaustion of the list of such resident eligibles, certification shall be made from the whole eligible list."

Although section 23, by its terms, is not applicable to fire or police eligibles or to New York City, such amendment is a striking example of how Congress intended states to remove obstacles in order to take advantage of available Model Cities Act funds.

It is, therefore, clear that the Model Cities legislation here under review is not of a preemptive nature so as to preclude state action in the area involved.

II.

New York State's highest court has authoritatively construed the New York State Constitution, Article 5, § 6, and the applicable New York Statutes, Gen. Munic. Law § 99-h (2) and (4), and Pub. Officers Law §§ 3 and 30, to prohibit the imposition of local residency requirements for positions in New York City's Uniformed Forces.

"Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict." *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971). We have already established above that the Model Cities Act itself requires that cities applying for funding under the Act present programs in conformity with state and local law. New York's highest court, the Court of Appeals, in the instant case authoritatively construed New York's Constitution and statutes to prohibit the imposition of residency requirements for positions in New York City's Uniformed Forces.

The legislation which authorized petitioners to ". . . apply for, accept and expend funds made available by the federal government . . . ." is contained in § 99-h (2) of the New York State General Municipal Law. However, such section expressly limits any application for funds from the federal government to a program ". . . which is not inconsistent with the statutes or constitution of this state. . . ." Furthermore, subdivision 4 of the statute emphasizes that ". . . it is not intended by this section to repeal by implication any existing provision of law." Thus, it is established that any proposed program may not contravene the laws of the State of New York.

The strong public policy of New York in favor of merit competitive examinations for filling civil service positions is embodied in its very Constitution. Article 5, § 6, of the New York State Constitution provides:

> "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive. . . ."

Special Term, in its opinion which was adopted by the New York Court of Appeals, found that the restrictive residency requirements of the proposed Model Cities program violated this basic provision of the New York State Constitution.

Furthermore, the New York State legislature has emphasized the importance of merit competition for members of the Police and Fire Departments, such departments being especially essential to the health, welfare, and safety of the people of the state. New York State Public Officers Law, Section 3 (2) provides:

> "*Neither* the provisions of this section or of any general, special or local law, charter, code, ordinance, resolution, *rule or regulation*, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, *shall apply to the appointment of a person as a member of the police force of any political subdivision or municipay corporation of the state* if such person resides (a) in the county in which such political subdivision or municipal corporation is located; or (b) in a county within the state contiguous to the county in which such political subdivi-

> sion or municipal corporation is located; or (c) in a county within the state contiguous to such political subdivision or municipal corporation; or (d) in a county within the state contiguous to a county described in item (c) hereof where the former is less than fifteen miles from such political subdivision or municipal corporation . . . ." [Emphasis added].

Substantially identical provisions apply to the fire department under subdivision 9.

Any doubt as to the applicability and the controlling effect of the New York State Public Officers Law may be readily dispelled by a consideration of the corollary provisions contained in the New York State Public Officers Law, Section 30. Subdivision 4 of Section 30 prohibited the petitioners herein from requiring incumbent members of the police force to reside within New York City. This section provides as follows:

> "Neither the provisions of this section, nor of any general, special or local law, . . . *rule or regulation*, creating a vacancy in a local office of a . . . municipal corporation if the incumbent thereof ceases to be a resident of such . . . municipal corporation, *shall apply in the case of a person who is a member of the police force of any political subdivision or municipal corporation of the state* . . . . [Emphasis added].

Similar provisions apply to members of the Fire Department under subdivision 5.

Petitioners [illegible] the objectives of Congress and in a manner which they attempted to implement was built in its violation of the laws and Constitution of the State of New York. In a belated attempt to correct their error, petitioners now seek to invoke the protection of the Supremacy Clause by citing numerous cases which either fail to support their contention or are inapposite.

Congress can, by operation of the Supremacy Clause, override and supersede state law. But, in the words of this Court, "[s]tatements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California* v. *Zook*, 336 U.S. 725, 731 (1949). In the Model Cities Act, Congress did not intend to make its jurisdiction exclusive. It specifically provided that federal assistance would be available for a program only if ". . . substantive local laws . . . are . . . consistent with the objectives of the program. . . ." 42 U.S.C. § 3303 (a) (4). It thus specifically disclaimed pre-emption of the field, leaving to the states and localities freedom to develop programs which conform both to the objectives of the Model Cities Act and to the precepts of state and local law.

Cities in New York State (R85), including New York City (R156), as well as cities in other states (R48, Exhibit I, p. 15), have managed to develop Model Cities programs which conform to both federal and state law. Despite New York's ban on residency requirement for members of the Uniformed Forces, there were innumerable methods that New York City could have used to increase the participation of Model Cities residents in its Uniformed Forces. Respondents themselves suggested that such residents receive special educational assistance to enable them to pass competitive examinations (R32). It is clear, therefore, that petitioners could have designed a program to meet the objectives of the Model Cities Act and yet be consistent with the State's laws.

Even if Congress had not made clear in the Model Cities Act itself that state laws were not to be pre-empted, the decisions of this Court hold that the test of whether the Supremacy Clause is to be invoked to strike down a state law is a rigorous one. A Congressional mandate to override state legislation must be "unambiguous," *Florida Lime and Avacado Growers, Inc.* v. *Paul*, 373 U.S. 132, 147 (1963), and "clearly manifest," *California* v. *Zook*, 336 U.S. 725, 733 (1949). This is especially true regarding legislation in areas of traditional state concern, statutes affecting the health and safety of state residents. *Penn Dairies, Inc.* v. *Milk Control Comm'n of Pennsylvania*, 318 U.S. 261, 275 (1943); *Maurer* v. *Hamilton*, 309 U.S. 598, 614 (1940); *Kelly* v. *Washington*, 302 U.S. 1, 13 (1937). There can be no question that the selection of members of Police and Fire Departments on the basis of merit examinations is most clearly a matter of utmost concern to the safety and welfare of the people of the State of New York. In light of § 3303 (a) (4), Congress in the Model Cities Act did not "clearly manifest" an intent to override state statutes such as those involved in the instant case.

This Court has recently reaffirmed that even in ". . . areas of coincident federal and state regulations the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulations where none clearly exists.'" *Seagram and Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 45 (1966). Clear standards have been defined and applied in cases involving concurrent state and federal regulations. In *Florida Lime and Avacado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963), this Court dealt with two statutes, the federal Agricultural Marketing Agreement Act of 1937 and the California Agricultural Code, both of which sought to insure the maturity of avacados reaching retail markets. Noting that the statutes embodied different maturity tests, this Court stated:

> "However, this difference poses rather than disposes of the problem before us. Whether a state may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines* v. *Davidowitz,* 312 U.S. 52, 67. By that test we hold that § 792 is not such an obstacle; there is neither such an actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field." *Id.* at 141

Since there was "no inevitable collision" between the two schemes in *Florida Lime,* the state law was allowed to stand.

There is no "inevitable collision" between the Model Cities Act and New York State's prohibition of residency requirements for members of New York City's Uniformed Forces. Prior experience with Model Cities programs confirms that one could be readily fashioned here to meet the purposes intended (See R 126-27). In such circumstances the "inevitable collision" required as a condition for the invalidation of otherwise valid state legislation is absent.

Conclusion

The Model Cities Act requires that programs be in conformity with state and local laws. Thus, Congress itself disclaimed any intent to preempt the field and thereby invalidate preexisting state and local laws. Even when there have been state and federal enactments in the same field, this Court has sought to reconcile the legislation and has struck down state statutes only when Congressional intent to preempt has been "unambiguous" and "clearly manifest." The goal of providing excellent Uniformed Forces to Model Cities areas and of recruiting Model Cities residents into such Uniformed Forces do not necessarily conflict with New York State's Constitutional and legislative prohibitions against local residency requirement for members of the Uniformed Forces. This Court need not even reach the constitutional issue which is unavoidable where state law conflicts inevitably with federal law which Congress intends to prevail, since the Congress itself in the Model Cities Act specifically provided that federally funded programs must conform to state and local laws.

The petition for a writ of certiorari should be denied.

Dated: New York, New York, October 31, 1973.

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Decision and Order of Court of Appeals
[33 N. Y. 2d 552]

Order reversed, without costs, on the opinion at Special Term and the judgment of Supreme Court, New York County, reinstated.

Concur: Judges BURKE, BREITEL, JASEN, GABRIELLI and JONES. Chief Judge FULD and Judge WACHTLER dissent and vote to affirm on the opinion at the Appellate Division.

Opinion of Appellate Division
[41 A. D. 2d 127]

STEVENS, P. J. The various petitioners, suing individually and as presidents of their respective organizations, commenced this article 78 proceeding to enjoin respondents from proceeding with a scheduled examination for positions as Aides Model Cities (M.C.) in the Fire and Police Departments and the Housing Authority, to enjoin the establishment of such positions, and to declare unlawful and unreasonable any actions of respondents to that end.

Petitioners-respondents (herein petitioners) obtained a stay at Special Term. This court, one Justice dissenting, modified to permit the examination to go forward but stayed the promulgation of any list or proposed acceptable answers. The dissenting Justice would have denied the stay entirely at that stage of the proceeding (*Matter of Maye* v. *Lindsay*, 37 A D 2d 803).

The proposed Aide (Model Cities) is a position with a starting salary of $5,750 per year and a maximum salary of $6,750. The duties in each category are fairly well defined. They do not include law enforcement or fire fighting authority. It is contemplated that at the end of six months the Aide will take or become eligible to take a promotion

examination for Patrolman (Model Cities) or Fireman (Model Cities), etc. They are not promoted to any regular title in any of the services, but solely to an M.C. title. In neither instance does the Aide become a regular member of the force, nor is his salary paid from city funds.

It is requisite that each applicant for the title of Aide (M.C.) be a resident "of a Model Cities area at the time of filing and must continue to reside in the same Model Cities area during the period of employment in a Model Cities title." Three Model Cities areas were designated by New York City. They are low-income areas, the population of which is either largely black or Puerto Rican or a combination of both. The program is designed to assist young men (ages 16 to 27) in the areas to become Aides in the three categories.

The Model Cities Program, which is funded by Federal funds and supplemental grants, which, incidentally, may or may not be available, seeks to upgrade the total environment of the slum or blighted neighborhoods selected, and to afford to its residents "maximum opportunities for jobs in the projects and activities of the program." The authority for, purpose of and scope of the program is found in chapter 41 of title 42 of the United States Code (U.S. Code, tit. 42, §§ 3301-3313).

The cities engaging in the program are required to plan, develop and carry out comprehensive city demonstration programs in accordance with the purposes of the statute. The Secretary of Housing and Urban Development (HUD) is authorized to make grants and provide technical assistance to enable them to do so. The demonstration program becomes eligible for assistance if "substantive local laws, regulations, and other requirements are, or can be expected to be, consistent with the objectives of the program" (U.S. Code, tit. 42, § 3303, subd. [a], par. [4]).

Petitioners attacked the residency requirement as violative of the statutes and Constitution of the State of New

York. The statutes upon which petitioners rely exempt policemen and firemen from residency requirements (Civil Service Law, § 23, subds. 4-a, 4-b; Public Officers Law, § 3, subds. 1, 2, 4 and 9; § 30, subd. 4). Petitioners further attack the program as violative of section 6 of article V of the New York State Constitution which requires appointments and promotions in the civil service to be by competitive examination. Special Term upheld petitioners and concluded that Congress has not excused compliance with what it concluded to be controlling provisions of State law. Special Term also invalidated the examination. Respondents appealed from the judgment entered.

The residency requirement applies only while the Aide is in an M.C. title. If successful in passing the initial examination and becoming an Aide (M.C.), the applicant can remain in that title a maximum of 15 months. In that period he must either successfully pass a second examination to policeman (M.C.), etc., or his employment is terminated. If successful, the applicant has taken two examinations and is not yet a policeman, fireman or Housing Authority patrolman. No program now exists for him to become such.

The fact is that the proposed Aides (M.C.) are not and may never become policemen, firemen or Housing Authority patrolmen. Essentially, in this respect, petitioners urge, and Special Term agreed, that the Aide (M.C.) is a preparatory step to becoming one of the foregoing. As noted earlier, when, as and if an Aide ever became a regular fireman or policeman the residency requirement now applicable to an Aide would not apply. Petitioners are complaining before they are hurt. Their present action is premature. Certainly they are not now aggrieved. Nor is it shown that someone outside of the areas in question who fits the stated requirements, exclusive of residence, was denied any right to which he was entitled. The argument here is premised on anticipatory harm.

Aides (M.C.) are just what the word implies. They are persons designed to assist in the performance of certain tasks. They are not to be armed or fight fires, and they are without the authority which the regular position carries. The provisions of the statute permitting and financing their creation are reasonably related to the express and desired goals. At this point they can hardly be considered competitive to the regular positions. They merely fill a need in a heretofore neglected area. Experimentation was and is warranted. Since the job categories created and the duties prescribed are completely different from any heretofore existing, the argument that they necessarily fall within the contemplation of the prohibitory statutes with respect to residency requirements, or the New York State Constitution with respect to competitive examinations, is of doubtful merit. We do not at this time pass upon any issue which might arise in the future when, conceivably, the lines of development merge.

In *Matter of Council of Supervisory Assns.* v. *Board of Educ. of City of N. Y.* (23 N Y 2d 458, 469), the court recognized and approved the "well-recognized power to create new positions for new needs" and to experiment in order to find solutions to urgent problems. Here, as in the cited case, there is no evasion of civil service requirements. The dire consequences envisaged by petitioners are not apparent. The judgment should be reversed, on the law, and the petition dismissed, without costs or disbursements.

Capozzoli, J. (dissenting). I most certainly approve of the objectives of the Model Cities Program and it is laudable indeed that it seeks to afford the residents of blighted neighborhoods "maximum opportunities for jobs in the projects and activities of the program". The particular program, which has led to the institution of this suit, will provide fine opportunities for young men in the age bracket 16 to 27 to prepare for their futures and it should be legally supported. The difficulty which is presented does not arise from the program, it arises out

of the obvious evasion by the City Civil Service Commission of the constitutional requirement of appointments on the basis of merit and fitness. To say to other young men in the same age bracket that they cannot participate in this excellent program, because they do not live in a particular neighborhood is a complete abandonment of the principle of merit and fitness, discriminatory and unfair. It does not contribute to harmonious relations amongst the residents of our city and, indeed, is likely to create discord, dissension and unrest at a time when everyone is striving for peace and understanding.

Because of this and for all the reasons expressed by the trial court in its excellent opinion, I dissent.

NUNEZ and KUPFERMAN, JJ., concur with STEVENS, P. J.; CAPOZZOLI, J., dissents in an opinion, in which LANE, J., concurs.

Judgment, Supreme Court, New York County, entered on April 18, 1972, reversed, on the law, and vacated, without costs and without disbursements, and the petition dismissed.

Opinion of Special Term

[69 Misc. 2d 276]

SAMUEL J. SILVERMAN, J. This is an article 78 proceeding to invalidate the actions of respondents in relation to the "Model Cities Program" to provide residents of Model Cities areas with preferential treatment in obtaining civil service appointments to the New York City Fire Department, Police Department, and Housing Authority Police, to enjoin respondents from establishing the titles of Aide (M. C.) Fireman (M. C.), Patrolman (M. C.), and Housing Patrolman (M. C.), and to restrain the administration of an examination for appointment to the title of Aide (M. C.). A basic objection to these examinations and titles is that they are open only to residents of Model Cities areas in the City of New York.

Petitioners sue both individually and as presidents of various organizations of policemen, firemen and Housing Authority patrolmen of the City of New York. Respondents are various city officials, including the Mayor, the Civil Service Commission, the Personnel Director of the city, the Police and Fire Commissioners, and the Chairman of the Housing Authority of the City of New York.

A preliminary injunction was granted by the Appellate Division permitting the disputed examination to go forward, but staying the promulgation of any resulting list or proposed acceptable answers, or any appointments based thereon, until the determination of this proceeding. (*Matter of Maye* v. *Lindsay*, 37 A D 2d 803 [1st Dept., Oct. 1, 1971].)

Chapter 41 of title 42 of the United States Code is entitled "Demonstration Cities and Metropolitan Development Program". Subchapter I (U. S. Code, tit. 42, §§ 3301-3313), headed "Comprehensive City Demonstration Programs", and the regulations promulgated thereunder, implement what is called the Model Cities Program.

Section 3301 contains the Congressional findings and declaration of purpose. The findings list the plethora of ills familiar to certain parts of our American cities; slums; concentration of poor people in certain areas; lack of housing and lack of services.

Under that statute, Federal moneys are made available to cities for Model Cities programs. The City of New York has applied for and presumably obtained funds to set up such a program.

As part of New York City's proposed program, the city designated three areas of the city as Model Cities areas—these being Central Brooklyn, Harlem—East Harlem, and South Bronx. Further, as part of the program, the City Civil Service Commission has created certain civil service titles, designated as "(Model Cities)" or "(M. C.)". Specifically, it has created the titles Police Aide (Model Cities), Patrolman (Model Cities), Police Trainee (Model Cities),

Fire Aide (Model Cities), Fireman (Model Cities), Fire Trainee (Model Cities), Housing Police Aide (Model Cities), Patrolman N. Y. C. Housing Authority Police Department (Model Cities), Police Trainee N. Y. C. Housing Authority Police Department (Model Cities).

The examination announced was for the establishment of a single list for the various Aide (M. C.) positions from which appointments would be made by either the Police Department, Fire Department, or Housing Authority. Appointments to Aide titles are to be for a period not to exceed 15 months; Aides not promoted within the 15 months will be terminated. After six months, Aides will be eligible to compete in a promotion examination for the respective positions of Patrolman (Model Cities), or, if under 21 years of age, Police Trainee (Model Cities); Fireman (Model Cities) or Fire Trainee (Model Cities); Patrolman New York City Housing Authority Police Department (Model Cities) or Police Trainee New York City Housing Authority Police Department (Model Cities). A Trainee, upon attaining the age of 21, will mature to the Patrolman, Fireman or Patrolman New York City Housing Authority Police Department (Model Cities) titles. From the positions of Patrolman (Model Cities), Fireman (Model Cities) or Patrolman New York City Housing Authority Police Department (Model Cities) candidates will be eligible to compete in promotion examinations for regular higher ranks in the Police Department, Fire Department and New York City Housing Authority police service, i.e., presumably sergeant or higher.

The duties of a Police Aide (Model Cities) are stated to be: "Under close supervision of the Police Department, working in a Model Cities area, assists and works mainly in programs designed to develop closer understanding and cooperation between the community and the Police Department; assists departmental personnel assigned to Model Cities areas in the attainment of Department objectives". The duties of the other Aides are similar.

The salaries of Aides will be $5,750 per year; the salaries of Patrolman (M. C.), Fireman (M. C.) and Patrolman New York City Housing Authority Police Department (M. C.) will apparently be the same as the salaries of the regular Patrolman, Fireman and Patrolman New York City Housing Authority Police Department, not (M. C.).

The commission has stated that the examination for Aide (M. C.) will be "less difficult than the regular entrance examination for Patrolman or Fireman", but that the promotion examination to the uniformed titles will be an "equivalent examination" which will be "equivalent to the regular open competitive examination for Patrolman, Fireman or Patrolman NYCHAPD. In addition the test will be designed to measure those special traits and understanding which enhance their capability to function effectively in the Model Cities areas".

The commission ordered an open competitive examination for the title of Aide (M. C.). It published the following residence requirement: "Applicants must be residents of a Model Cities area at the time of filing and must continue to reside in the Model Cities area during the period of employment in a Model Cities title".

Petitioners attack the validity of the proposed examination on the ground that the commission has no authority to establish this residence requirement; that the examination, and particularly the residence requirement, is a violation of the constitutional requirement of appointments on the basis of merit and fitness; that the plan involves racial discrimination (what has been called "reverse discrimination"). Respondents dispute each of these contentions, and further contend that the requirements are valid under the Supremacy Clause of the United States Constitution.

A. *Requirement of Compliance with State Statutes*

Respondents argue that they are excused from compliance with otherwise controlling State statutes because of the Supremacy Clause of the Federal Constitution, and

because of provisions of the applicable State statutes. I cannot accept either argument.

1. The Supremacy Clause of the United States Constitution (art. VI) provides in substance that the Constitution and the laws of the United States shall be the supreme law of the land. As it relates to Federal statutes this provision results in overriding State statutes only when the Congress intends to override State statutes. Here, the Congress explicitly stated that it did not intend to override State statutes. Thus, section 3303 (subd. [a], par. [4]) of title 42 of the United States Code specifically provides that a comprehensive city demonstration program (i.e., a Model Cities program) is eligible for assistance under the act only if "substantive local laws, regulations, and other requirements are, or can be expected to be, consistent with the objectives of the program."

This requirement has been recognized in a bulletin issued by the United States Department of Housing and Urban Development in December 1967, which provides (p. 24): "If local or State laws and regulations present obstacles to achieving program goals, appropriate modifications should be sought."

I conclude that the Congress did not intend to override State legislation.

2. The authorizing State legislation does not excuse compliance with other State laws. Section 99-h of the General Municipal Law which authorizes municipalities to participate in Federal programs, such as the Model Cities program, provides that any municipal corporation shall have power to accept funds made available by the Federal Government "pursuant to the provisions of any federal law, which is not inconsistent with the statutes or constitution of this state" (subd. 2). And subdivision 4 of that section provides that "it is not intended by this section to repeal by implication any existing provision of law."

Accordingly, the city's program to be valid must comply with applicable State statutes.

B. *Lack of Compliance with State Statutes*

3. Petitioners contend that the residence requirement is a violation of sections 3 and 30 of the Public Officers Law. Section 3 of the Public Officers Law is entitled "Qualifications for holding office" and in general provides that "No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto • • • be • • • a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen • • • or within which his official functions are required to be exercised". The statute then goes on to make a number of exceptions to this requirement, of which the most significant for our purposes are subdivisions 2, 4 and 9. They provide in part as follows:

"2. Neither the provisions of this section nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a person as a member of the police force of any political subdivision or municipal corporation of the state if such person resides (a) in the county in which such political subdivision or municipal corporation is located; or "[various other counties within the city or state, essentially any county contiguous to the city or a county contiguous to a county within the city or less than 30 miles from the city]. • • •

"4. Except as otherwise provided in subdivision nine of this section, persons heretofore or hereafter employed in the paid fire department of a city, town, village or fire district shall not be deemed to be holding a civil office or a local office within the meaning of this section and the provisions of this section shall not apply to such persons. The provisions of any general, special or local law, city

or village charter, code or ordinance, or any rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised shall not apply to the appointment or continuance in office of any such person so employed, if such person resides in the county, or one of the counties, in which such political subdivision or municipal corporation is located. * * *

"9. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a paid member of the uniformed force of a paid fire department * * * of any city of over one million population who resides (a) in the county in which such city is located; or (b) in a county within the state contiguous to the county in which said city is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city."

Section 30 of the Public Officers Law entitled "Creation of vacancies" provides that: "Every office shall be vacant upon the happening of one of the following events * * * d. His ceasing to be an inhabitant of the state, or if he be a local officer, or the political subdivision, or municipal corporation of which he is required to be a resident when chosen". Again there are various exceptions of which the most important for our purposes are subdivisions 4 and 5 reading in part as follows: "4. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be

a resident of such political subdivision or municipal corporation, shall apply in the case of a person who is a member of the police force of any political subdiviison or municipal corporation of the state and who while a member of such force resides (a) in the county in which such political subdivision or municipal corporation is located; or" [various other counties somewhat analogous to the provisions of subdivision 2 of section 3]. * * *

"5. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of a paid member of the uniformed force of a paid fire department * * * who resides (a) in the county in which said city is located; or" [various other counties somewhat analogous to the provision of subdivision 2 of section 3].

Respondents argue that these statutes merely create an exception to the residence requirement of sections 3 and 30 of the Public Officers Law and do not forbid the imposition by the Civil Service Commission of residence requirements; that these exceptions are merely intended essentially to remove police and fire officer from the definition of public officers for this purpose. I cannot accept this argument. The fair meaning of these statutes is to permit police and fire officers to live in the specified areas outside the political subdivision in which they are to perform their functions. Subdivisions 2 and 9 of section 3 of the Public Officers Law and subdivisions 4 and 5 of section 30 create exemptions not only from the Public Officers Law requirement of residence applicable to public "officers" but also from "any general, special or local law, charter, code, ordinance, resolution, rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation" etc. Indeed the first sentence of subdivision 4 of section 3

read with subdivision 9 seems to be an almost explicit rejection of the contention that the statute merely means that fire officers of the City of New York are not public officers.

Again, subdivision 4-b of section 23 of the Civil Service Law is a rather persuasive indication that the Legislature did not intend to allow civil service commissions to impose residence requirements for police and fire officers in the City of New York. Section 23 by its terms does not apply to the City of New York (subd. 5) but in authorizing other cities to require residence in a geographically defined area which is a portion of such city for positions in that area where required in order to qualify for Federal moneys, there is an express exception for "those eligibles on policemen and firemen lists".

I think the provisions of subdivisions 2 and 9 of section 3 of the Public Officers Law, and subdivisions 4 and 5 of section 30 of the Public Officers Law do not apply literally to the position of Aide (M. C.). Thus, subdivision 2 of section 3 and subdivision 4 of section 30 refer to "a member of the police force"; subdivision 9 of section 3 and subdivision 5 of section 30 refer to "a paid member of the uniformed force of a paid fire department".

An Aide (M. C.) is not, I think, either a member of the police force or a paid member of the uniformed force of a paid fire department. But the position of Aide (M. C.) is merely a preparatory position. The whole point of the creation of the position of Aide (M. C.) is eligibility for promotion to Patrolman (M. C.) or Fireman (M. C.) or Patrolman New York City Housing Authority, Police Department (M. C.), and indeed, further eligibility for promotion to the higher ranks of the uniformed police and fire departments. (I think a Patrolman in the New York City Housing Authority Police Department is "a member of the police force of any * * * municipal corporation of the state" within the meaning of sections 3 and 30 of the Public Officers Law. Cf. Public Housing Law, §§ 401, 402, subd.

5.) Unless the promotion takes place within 15 months, the position of Aide (M. C.) is terminated.

If, as I think, the requirements of residence within the Model Cities area invalidates provisions for promotion to the various Patrolman (M. C.) and Fireman (M. C.) positions, then the whole plan for Model Cities positions in the city civil service limited to residents within the Model Cities area fails.

I express no opinion as to the power of the heads of the various departments to assign to duties within the various Model Cities areas any regularly appointed patrolmen and firemen who may reside in those areas.

4. Quite apart from the special provisions of sections 3 and 30 of the Public Officers Law forbidding residence requirements for policemen and firemen more restrictive than those set forth in the statutes, I think the requirement of residence within the Model Cities area in the circumstances of this case violates the constitutional and statutory civil service requirements for appointments based on merit and fitness to be determined by competitive examinations, as far as practicable.

The basic civil service requirement is contained in section 6 of article V of the State Constitution, reading in part as follows: "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive;" (with exceptions not here relevant).

5. Respondents suggest that the residence requirement is somehow related to the desirability that the appointee shall have a special sensitivity to, understanding of, and experience with problems of the Model Cities areas. Petitioners contend that the residence requirement is merely a means of assuring that jobs shall go to a particular group—residents of the Model Cities areas.

I cannot accept the argument that the residence requirement can be justified on merit and fitness grounds because of the special sensitivity, understanding and experience required. I do not think it can rationally be contended that a person who has lived in the area all his life and moved to an adjoining area the day before the test, is less sensitive to, understanding of, or experienced with the problems of the area than a person who has never lived in the area, but moved in the day before the test; yet the latter is qualified to take the test and the former is not.

If, as respondents contend, these qualities of special sensitivity, understanding and experience can be objectively tested for, then they should be; and respondents say they will be. But to require residence within the Model Cities areas at the time of examination is not, I think, objectively related to those qualities. Rather, it is a means of affording employment to residents of the areas in preference—perhaps justifiable preference—to nonresidents of the areas. Indeed, that is one of the objectives of the Model Cities programs. The Corporation Counsel explicitly states that "The program here under attack was necessary in order to '[provide] maximum opportunities for employing residents of the areas in all phases of the program.'"

Respondents rely heavily on *Matter of Council of Supervisory Assns.* v. *Board of Educ. of City of N. Y.* (23 N Y 2d 458 [1969]). In that case the Court of Appeals held that the Board of Education of the City of New York could make temporary appointments to the position of principal of demonstration schools, not from the regular existing school principals' list, on the ground that the position of principal of the demonstration elementary schools required qualifications different from those for the regular principals' job, including among other things, experience with the race problems in relation to education and experience with community relations. The court explicitly made the distinction that it was the difference in the job that made the existing list inapplicable and that these additional requirements would have

to be tested for by "specific and objective criteria of experience in the area of community-education programs." (p. 468). The Court of Appeals said (p. 469): "This decision * * * is limited to a well-recognized power to create new positions for new needs and to fill them temporarily until lists based on examinations can be promulgated. The court will not permit such a procedure to be used as a device for evasion of the civil service requirements".

Thus the various civil service commissions of the State have power to define jobs and to state and test for the requirements for the jobs. But they cannot decide that what they wish to do is to give employment to particular persons or particular groups, and fit the requirements for the jobs to those groups. Here it is quite plain—it is indeed one of the express objectives of the program—that it is desired to give employment to residents of the Model Cities area and therefore the examinations are limited to such residents. This may be a very desirable thing to do. But I think it runs counter to the basic State constitutional requirements that "appointments and promotions in the civil service * * * shall be made according to merit and fitness."

6. Petitioners argue that the residence requirement involves reverse racial discrimination because the residents of the Model Cities area are largely Black or Spanish-speaking. The Court of Appeals in the *Council of Supervisory Assns.* case (*supra*) said: "The position could not lawfully be filled on the basis of race" (p. 467). "Race or religion cannot, as qualifying factors, constitutionally be considered but experience can be considered" (p. 468).

There are some statements by the Administrator of the Model Cities Policy Administration of the city which seem to lend some support to petitioners' contention, e.g., in a letter dated September 21, 1971, to the Assistant National Administrator, the City Administrator, Mr. Williams, states: "Rigid Civil Service requirements have been the major impediment to increasing the number of Blacks and Puerto Ricans in the Police and Fire Departments.

Thus, we believe our proposal is consistent with the intent of the Model Cities enabling legislation since it represents an important step in modifying those unfair requirements."

If the civil service requirements are unfair they should of course be corrected by appropriate changes in the examinations. But I do not think this justifies imposing residence requirements. Perhaps it is enough as to this aspect of the case to again quote the Court of Appeals in the *Council of Supervisory Assns.* case (p. 467): "The fact some proponents of experimental changes argued this would mean selection only from members of the ethnic groups themselves, as this record suggests, is not decisive. Nor is this viewpoint controlling on the board. This is not the basis on which the new position was described and promulgated in the official records of the board."

7. This is not the first time that an effort has been made by civil service commissions to limit appointment to residents of particular areas less than the political subdivision in which they are appointed, and to do so without statutory authority. Such efforts have uniformly been declared invalid on the ground that the only residence requirement that can be imposed without express statutory authority is a residence requirement not more restrictive than a recognized political subdivision of the State. So it was held in *People ex rel. Melledy* v. *Shea* (73 App. Div. 232, 235-236 [1st Dept., 1902]), where the court said: "It is not difficult to see that if the commission had power to subdivide a given locality into as many districts as it saw fit, and then by rules of its own adoption make an applicant ineligible to appointment to a position except in the district in which he resided at the time the application was made, how the object sought to be accomplished by the statute would be entirely defeated and the statute, in effect, repealed."

Indeed, where appointment is to a city-wide department, a requirement (without statutory authority) of residence within a particular borough for jobs within that borough is

invalid. (*People ex rel. Franklin* v. *Fetherston*, 168 App. Div. 416 [2d Dept., 1915].)

8. For the reasons stated, I think that in the circumstances of this case the requirement of residence is invalid.

Of course, even the constitutional requirement of merit and fitness (much less the statutory restriction on residence requirements) was not handed down on Mount Sinai. There is room for systems of values in which other considerations may even outweigh the constitutional requirement of appointments based on merit and fitness. (Indeed, the constitutional exception "as far as practicable" is to some extent a recognition of this fact; but "practicable" is not a synonym for "advisable".) Whether some other ends and values outweigh the requirement of merit and fitness or the statutory restriction on residence requirements is a question of policy to be determined by those to whom such decisions are confided—the people of the State, the Legislature, and perhaps the Congress—and the State Constitution and the applicable statutes are the definitive and binding expression of those policy determinations. The present statutes of this State I think forbid the residence requirement sought to be imposed.

Accordingly, the petition is granted to the extent of invalidating the examinations for Aide (Model Cities) and the requirement in connection therewith of residence in the Model Cities areas.

Decision and Order of Appellate Division

[37 A. D. 2d 803]

Order, Supreme Court, New York County, entered on September 29, 1971, modified on the law and the facts to the extent of vacating the stay of the examination contained in said order, and to the further extent of permitting the examination to go forward, but staying the promulgation of any resulting list or proposed acceptable answers, and

prohibiting any appointment based thereon until the determination of the motion in chief and subsequent appeal or appeals therefrom, if any, and otherwise affirmed, without costs and without disbursements. The foregoing determination is based upon the following reasons: It appears that by September 20, 1971 some 3,100 preapplication forms had already been received by the Civil Service Commission, the notice of the subject examination having issued on August 27, 1971, and it is anticipated that 3,100 applicants will appear for the examination at 9:30 A.M. tomorrow at the George Washington High School in Manhattan and the Thomas Jefferson High School in Brooklyn. The petitioners did not commence the instant proceeding until September 24, 1971, returning their order to show cause September 28, 1971. Since the examination per se does not displace nor limit the professional opportunities of any of the petitioners, and since the giving of the examination will not in any way affect the respective positions of the petitioners, the giving of the examination itself will not constitute a determination of status relative to those interested in taking the examination. Accordingly, we make no observation on the underlying merits of petitioners' petition until a full hearing has been held before Special Term presently scheduled for October 22, 1971, and the matter properly comes before us on an adequate record. Concur—McGivern, J. P., Kupferman, Murphy and McNally, JJ.; Nunez, J., dissents, in part, in the following memorandum: I concur except as to the continuance of the stay pending any appeal or appeals. It is unprecedented and clearly premature to grant a stay at this early date without any knowledge or consideration of the merits of the litigation. The court will be in a much better position to grant such a stay if warranted following the initial determination on the merits.